Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)))	WT Docket No. 17-79
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	))	WC Docket No. 17-84

COMMENTS OF MOBILITIE, LLC

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I. INTRODUCTION AND SUMMARY

Mobilitie, LLC ("Mobilitie") commends the Commission for instituting these important proceedings.[1] The time is now for it to take forceful action to expedite broadband deployment, for two fundamental reasons: First, there is no question that massive new investments in wireless infrastructure are needed. The explosive growth in 4G wireless services is putting enormous and accelerating demands on wireless networks. The services that will enable 5G, smart cities, connected vehicles, the Internet of Things, and other beneficial technologies will drive those demands far higher. Second, there is equally no question that needed deployment is being materially slowed and impeded by regulatory barriers. Removing those barriers is absolutely the correct action to take. It is right under the law, and the right policy choice.

Mobilitie is a privately-held company which was founded to accelerate the deployment of broadband. It was built on the vision that the United States needs huge investments in wireless

[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79 ("*Wireless NPRM/NOI*"); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment, WC Docket No. 17-84 ("*Wireline NPRM/NOI*").

networks if the nation is to reap the economic and social benefits that broadband can deliver. The company is committed to investing in those networks, because broadband is the essential public service for the 21st century, just as important as landline phone networks were in the 20th century. People increasingly depend on broadband to get an education, apply for a job, secure health care, obtain government services, and generally to live their lives.

Broadband is particularly critical for those citizens who depend on wireless to stay connected, including millions of low-income citizens, and Mobilitie's cardinal objective is to deploy the networks that provide those connections. The company funds next-generation infrastructure that enables robust 4G coverage and upcoming 5G services and speeds. Its infrastructure includes small cells, communication towers, indoor and outdoor neutral host systems, and WiFi networks. It intends to pursue its vision of fast, high-quality and ubiquitous broadband to serve communities across the nation.

Mobilitie, however, has confronted multiple local regulatory barriers that are interfering with its ability to deploy broadband infrastructure and services that are so critical to the nation's future. Its November 2016 Petition for Declaratory Ruling ("Petition")[2] asked the Commission to dismantle one of those barriers: the excessive fees that many localities are imposing on wireless providers for access to local rights of way ("ROWs"). Mobilitie explained that this Commission action was urgently needed, and that it would implement the language and purpose of Section 253 of the Communications Act ("Act").

[2] Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way, Petition for Declaratory Ruling, filed November 15, 2016.

The Commission subsequently initiated a proceeding on Mobilitie's Petition that sought comment on ways to improve wireless siting policies and streamline deployment.[3] The resulting record revealed dozens of excessive, unreasonable and discriminatory fees, and documented how those fees were impairing and delaying broadband deployment. Beyond excessive fees, commenters supplied numerous examples of other practices by some local governments that were slowing or outright stopping deployment, and called on the Commission to prohibit them. [4]

The Commission's new proceedings expand the scope of the Commission's efforts to address any and all federal, state and local barriers that stand in the way of rapid broadband deployment. Mobilitie supports this broad approach because comprehensive action is needed across many fronts in order to facilitate construction of network infrastructure critical to achieving the promise of broadband. In these comments Mobilitie renews its request that the Commission remove three types of barriers – excessive siting fees, unreasonable delays on siting applications, and restrictions or requirements that unlawfully intrude into providers' decisions as to how to build their networks to best serve the public.

The Commission should also streamline the pole attachment process which Congress established in Section 224 of the Act. Delays and other obstacles in accessing utilities' poles are directly impeding providers' ability to deploy network infrastructure. The Commission should take at least the following three actions to streamline the pole attachments process: (1) allow new attachers to use utility-approved contractors to perform make-ready work; (2) require

[3] Public Notice, Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Siting Facilities; Mobilitie, LLC Petition for Declaratory Ruling, WT Docket No. 16-421 (released Dec. 22, 2016).

[4] The Commission invited parties to submit information in their prior filings identifying types of local barriers to broadband deployment into the record of these new proceedings. *Wireless NPRM/NOI* at ¶ 6 n. 9. Mobilitie thus includes with these comments its Petition, Comments and Reply Comments in WT Docket No. 16-421, as Attachments 1, 2 and 3 respectively, and incorporates them by reference.

utilities to establish transparent, uniform procedures and standards for approving attachments; and (3) require that utilities disclose and place online basic pole management information, including authorized vendors, pole locations and specifications, structural design parameters, and all make-ready and any other charges attachers may incur.

II. THE FCC SHOULD OUTLAW EXCESSIVE AND DISCRIMINATORY FEES.

Many localities are imposing extremely high fees – as much as $10,000 or more per site in up-front licensing and application charges, and equally excessive annual "rents."[5] These high fees are not based on localities' costs to manage ROW access and oversee deployment. Mobilitie explained why those excessive fees – which had not been imposed on other ROW occupants – undermine Congress' objective in Section 253(c) of the Act that fees imposed on providers must be fair, reasonable and nondiscriminatory. It asked the Commission to make three rulings to effectuate and enforce Section 253(c):

- "Fair and reasonable compensation" means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way. Additional charges or those not related to actual use of the right of way, such as fees based on carriers' revenues, are unlawful.

- "Competitively neutral and nondiscriminatory" means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access. Higher charges are discriminatory and therefore unlawful.

- Localities must disclose to a provider seeking access to rights of way the charges that they previously assessed on others for access.[6]

Many providers in WT Docket No. 16-421 supported the Petition, demonstrating that the scope of the problem is nationwide. They documented their experiences with localities'

[5] Petition at 12-19.

[6] *Id.* at 36.

demands for substantial up-front and recurring fees that are costing thousands of dollars per site per year, providing dozens of examples of excessive upfront and recurring siting fees.[7] They also explained why some jurisdictions' argument that they can impose "market" rents for ROW access is meritless: Section 253(c) does not authorize such rents, and in any event, there is no true "market" for ROW access, because jurisdictions hold monopoly control over that access.[8] Allowing "market" rates would be tantamount to empowering localities to charge whatever fees they want, nullifying Congress' objective in Section 253 to permit localities to be compensated for their costs in issuing permits and managing ROW access. In short, the Commission has an ample record basis on which to grant the Petition. Because these excessive fees continue to impose barriers to deployment nationwide, the Commission should outlaw them now.

III. THE FCC SHOULD SHORTEN THE SHOT CLOCKS AND MAKE THEM MORE EFFECTIVE.

The Commission can significantly alleviate siting delays by shortening the "shot clocks" that currently apply to local review of wireless facilities and how they operate. The shot clocks were adopted to set reasonable time periods pursuant to Section 332(c)(7)(B)(ii) of the Act for localities to act on applications to construct new towers and to collocate macrocells on existing towers. They were not designed for reviewing far less visually intrusive small cells, microcells, and the short poles on which those facilities are located. Commenters in WT Docket No. 16-421 demonstrated that localities can act on small cell permits much faster, and that the Commission

[7] *See, e.g.*, AT&T Comments at 19-21; CCA Comments at 16; CTIA Comments at 15; Sprint Comments at i, 24-26, Tech Freedom Comments at 5; T-Mobile Comments at 10; Verizon Comments at 9 and Appendix; *see also* Mobilitie Reply Comments at 8. (All comments cited herein were filed in WT Docket No. 16-421.)

[8] *See, e.g.*, CCA Comments at 26; T-Mobile Comments at 30; Verizon Comments at 15; Mobilitie Reply Comments at 11-12.

has the authority to modify the shot clocks to reflect the realities of wireless deployment today.[9] The compelling public interest in the rapid deployment of essential new infrastructure to support broadband networks supplies a strong public policy basis for shortening the shot clocks. The Commission should thus rule that 60 days is a reasonable time for localities to act on applications for new and collocated small cell facilities.

The record in WT Docket No. 16-421 also showed, however, that shortening the shot clocks will not alone be sufficient to speed broadband deployment. One major obstacle is that some localities require providers to endure lengthy zoning or franchising procedures before the localities will accept individual siting applications and before (they assert) the shot clocks begin to run. Those procedures undermine the effectiveness of the shot clocks in speeding deployment by tacking on many months of delay.[10] In addition, some localities have asserted that the shot clocks do not apply to ROW facilities, which also undermines their utility, because deployment of small cell facilities along ROWs are increasingly essential to wireless broadband networks. The Commission should address both of these issues at the same time it shortens the shot clock periods by issuing a declaratory ruling that:

- Action on a small cell permit is presumptively unreasonable under Section 332(c)(7)(B)(ii) if it is not acted on within 60 days.
- If a locality determines a provider must secure a citywide license or franchise before it can access rights of way, the shot clocks apply to that entire process from licensing through permitting.

[9] *See, e.g.,* Mobilitie Comments at 10-12; CTIA Comments at 12-14; AT&T Comments at 4, 15-16, Crown Castle Comments at 12-13.

[10] *See, e.g.,* Mobilitie Comments at 16 (providing examples of long delays); AT&T Comments at 23; Extenet Systems Comments at 7-8; Verizon Comments at 18-19.

- The shot clocks apply to permits that seek access to rights of way and to municipal streetlight and traffic poles and other structures located in rights of way.[11]

IV. THE FCC SHOULD OUTLAW SPECIFIC BARRIERS TO DEPLOYMENT.

The Commission asks in the *Wireless NPRM/NOI* whether it should take action to implement Section 253(a) of the Act by addressing types of laws, regulations or practices that "prohibit or have the effect of prohibiting" service. The record the Commission compiled in WT Docket No. 16-421 contains numerous examples of such barriers, and supplies a substantial factual basis on which to issue a declaratory ruling that those barriers violate Section 253(a).

Commenters demonstrated, for example, that localities have enacted moratoria that expressly prohibit deployment, or are following practices that are the equivalent of moratoria because they have the same impact: deployment is stonewalled.[12] Commenters also documented local regulations which prohibit new poles, impose minimum distances between small cell locations, and otherwise interfere with a provider's design of its network. Another well-documented deployment obstacle is the anachronistic requirement that a provider prove that a geographic coverage gap exists as a condition to obtaining a permit.[13] Today's broadband network deployments are not about filling coverage holes. They are needed to expand network capacity to improve network speeds and reliability and provide the rapidly growing new services that customers demand. The Commission should eradicate these barriers by interpreting Section 253(a) as follows:

- Localities may not enforce moratoria, either in the form of ordinances that explicitly block reviews of siting permits, or *de facto* moratoria in which localities refuse to act

[11] Mobilitie Comments at 4.

[12] *See, e.g.*, Mobilitie Comments at 10-12 (providing examples of local restrictions or conditions that impede deployment); AT&T Comments at 15-16; CCA Comments at 29-30.

[13] Mobilitie Comments at 13.

on permits, or in the form of undergrounding ordinances that make no exception for the minimal equipment that must be above ground to provide wireless service.

- They may not prohibit the installation of new poles or replacement poles along ROWs by restricting deployments only to attachments to existing poles, or by imposing minimum distance requirements based on the location of competing providers' facilities.

- And they may not require a provider to demonstrate there is a coverage gap or other business need in the area to be served by the new site.[14]

V. THE FCC SHOULD STREAMLINE THE POLE ATTACHMENT PROCESS.

The *Wireline NPRM/NOI* correctly observes that the current process for attaching facilities to utility poles is unnecessarily slow and complex. The Commission should take at least the following three actions to further implement its authority under Section 224 of the Act. These actions will streamline the process, thereby expediting broadband deployment, while at the same time continuing to safeguard the public interest in the safe attachment of new equipment.

1. Utility-approved contractors should be allowed to perform make-ready work. The Commission should adopt a rule to allow new attachers to use utility-approved contractors to perform make-ready work.[15] This action will streamline the attachment process by preventing unjustified delays. The current process can devolve into a drawn-out back and forth between the new attacher, the utility, and existing attachers as to who will perform the make-ready work and when, often producing series of work by different contractors, each laboriously identified and scheduled. Each step in that process consumes time, and in the aggregate can add many weeks to the overall attachment process. Moreover, existing attachers have no incentive to expedite the process.

[14] *Id.* at 3.

[15] *Wireline NPRM/NOI* at ¶ 14.

A more sensible and efficient process is for the new attacher to use the utility's own contractors to complete the make-ready work. Some utilities Mobilitie has worked with do have contractors that Mobilitie has retained to perform some or all of the necessary work, but others do not. The Commission should require that all utilities make this process available. The utility can be expected to ensure that those contractors are fully trained and qualified to perform this work, given its contractual commitments to attachers and its own incentive to ensure all work is performed safely and properly. To the extent there is concern that existing contractors are not qualified or trained in the installation of pole-top wireless facilities as opposed to attachments in the communications space on the pole, the Commission could require utilities to keep a separate list of contractors who are authorized to perform this type of make-ready work.[16]

2. Utilities should be required to establish transparent, uniform procedures and standards for approving attachments. The Commission correctly observes that "making more information publicly available regarding the rates, location and availability of poles also could lead to faster pole attachment timelines."[17] In Mobilitie's experience it can be difficult to obtain that information from utilities. It is often unavailable at a central location, unavailable online, or both. This lack of transparency slows and complicates the attachment process. There is no reason today why utilities should not be required to place online all information providers need to file attachment applications, and to accept those application online as well.

A related problem is that some utilities lack uniform procedures and standards for reviewing attachment proposals. Instead, different utility personnel follow varying procedures and standards. Alternatively, a utility that operates across a large geographic area may have different rules in different parts of its footprint. For example, one large utility has imposed

[16] *Id.* at ¶ 16.

[17] *Id.* at ¶ 27.

materially different standards on Mobilitie's proposed pole installations depending on the location of the poles Mobilitie seeks to access – even though essentially identical equipment would be installed across these locations. Again, there is no justification for a utility to have such disparate requirements, which delay and complicate deployment.

The Commission should address these problems by requiring a utility to post online all information providers need to have in order to apply for pole attachments, including all of the utility's procedures and standards. It should additionally require that a utility establish uniform procedures and standards for attachments. Transparency and uniformity will streamline the pole attachments without burdening utilities, who would likely benefit from having to put in place uniform procedures.

3. Utilities should be required to disclose basic pole management information, other information, and all make-ready and any other charges online. The Commission also seeks input on how to "reduce make-ready costs and make such costs more transparent," and asks whether it should require utilities to have "a schedule of common make-ready charges to create greater transparency for make-ready costs."[18] The benefits of transparency apply to utilities' disclosure of their pole attachment charges as well as their procedures and standards. While some utilities have placed a schedule of their fees online, others have not, or only disclose some information. It is burdensome and time-consuming for providers to have to contact multiple sources in a utility to secure that information, particularly where the utility operates across a large area and thus may have different charges in different areas. Moreover, that information may not be complete. For example, Mobilitie has sought to work with some utilities which do not disclose in their make-ready charges the costs they impose for delivering electric power to the attached equipment, which is of course a necessary step for completing deployment. Again,

[18] *Id.* at ¶¶ 32-33.

it should not be burdensome to utilities to be required to place all of their charges online, and to ensure that all potential costs to attachers are disclosed.

The Commission should thus adopt a new rule requiring that utilities disclose and place online basic pole management information, including authorized vendors for all utility and prior attacher pole work, pole specifications and locations, maintenance schedules, structural design parameters, and all make-ready and any other charges which attachers may incur.

VI. CONCLUSION

For the reasons set forth above and in the record in WT Docket No. 16-421, the Commission should (1) adopt a declaratory ruling that governmental fees for deploying infrastructure should be limited to the costs of overseeing that deployment and not discriminate among providers; (2) help expedite deployment by shortening the shot clocks and making them more effective in achieving their purpose; (3) outlaw specific types of laws and practices that have the effect of slowing, impeding or deterring deployment, and (4) streamline the pole attachments process.

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June 15, 2017

ATTACHMENT 1

STAMP & RETURN

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promoting Broadband for All Americans by	)	WT Docket No. _____
Prohibiting Excessive Charges for Access to	)	
Public Rights of Way	)	

PETITION FOR DECLARATORY RULING

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November 15, 2016

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Public Rights of Way	)	

To: The Commission

PETITION FOR DECLARATORY RULING

Mobilitie, LLC ("Mobilitie") petitions the Commission pursuant to Section 1.2 of its Rules for a declaratory ruling interpreting three phrases in Section 253(c) of the Communications Act of 1934, as amended,[1] to speed the deployment of critical advanced wireless infrastructure. First, the Commission should interpret "fair and reasonable compensation" to mean charges that enable a locality to recoup its costs related to issuing permits and managing the rights of way, but no more. Second, it should interpret "competitively neutral and nondiscriminatory" to mean charges that do not exceed those imposed on other providers for similar access. Third, it should interpret "publicly disclosed by such government" to obligate localities to make available to a provider seeking access the rights of way charges they previously imposed on others. These actions will stop excessive and unfair rights of way fees that are impeding wireless broadband deployment, provide clarity and certainty to providers and localities alike, head off and resolve

[1] Section 253(c), 47 U.S.C. § 253(c), states, "Nothing in this section affects the authority of a State or local government to manage the public right-of-way or to require *fair and reasonable compensation* from telecommunications providers, *on a competitively neutral and nondiscriminatory basis*, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is *publicly disclosed by such government*." (emphasis added)

disputes, and thus accelerate more investment in network infrastructure – investment that is necessary to support the American public's exploding demand for wireless broadband.

I. INTRODUCTION AND SUMMARY

Wireless facilities and the networks that connect them are the critical infrastructure of the 21st Century. Wireless, and particularly wireless broadband, is for all practical purposes the newest essential public service, just as telephones and electricity were the essential services of the last century. Robust deployment of wireless facilities and networks demonstrably serves the public interest, and carriers that invest in and build that infrastructure should have the same affordable access to rights of way that companies providing other essential services have enjoyed for decades.

The fundamental purpose of rights of way has always been to benefit the public. Rights of way have always served the public interest by enabling citizens to obtain and use essential services, such as electricity, telephone, gas, water, and transportation.[2] Access to rights of way is a prerequisite to the deployment of the infrastructure that supports those services. Congress has specifically determined that federal, state and local rights of way should be available for communications infrastructure: Section 253 prohibits state and local regulatory "barriers" to new telecommunications services, including barriers to using rights of way.[3]

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[2] *See* Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 Dick. L. Rev. 209, 215 (2002) ("Gillespie") ("Use of the streets for these purposes is not only consistent with the public purpose for which the streets were dedicated but benefits the municipality."); *Montana-Dakota Utils. Co. v. City of Billings*, 80 P.3d 1247, 1251 (Mont. 2003) (observing that "Since the nineteenth century, state and local governments in Montana have granted franchises to private or public corporations for the construction and maintenance of infrastructures within the public rights-of-way to provide essential services to the public)".

[3] Congress had previously made *federal* rights of way available for communications services. The 1976 Federal Land and Policy Management Act authorized the creation of rights of way on federal lands, and permits access for a wide variety of purposes, including the "transmission or reception of radio,

Removing obstacles to deploying small cell networks in rights of way is particularly important because the wireless broadband those networks deliver will play a vital role in closing any gaps in nationwide broadband deployment. The Commission has found that *all* consumers require wireless broadband to have true and meaningful access to the Internet.[4] Given that over 31 million American adults are smartphone-only, with 15 percent of all Americans having a smartphone as their primary – often only – option for broadband access, actions that further deployment and drive such access clearly serve the public interest.[5] Many citizens who lack access to robust wireless broadband reside in urban areas, where small cell deployments along rights of way offer the optimal, if not the only, solution to making broadband available to meet increasing demand.[6] Given the major role that small cell deployments will play in expanding the availability of wireless broadband and 5G to all Americans, preventing excessive fees that

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television, telephone, telegraph, and other electronic signals, and other means of communication." 43 U.S.C. § 761 *et seq.*

[4] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, 31 FCC Rcd 699, 706 ¶ 17 (2016) ("consumers have advanced telecommunications capability only to the extent that they have access to . . . mobile broadband service"); Commissioner Mignon L. Clyburn, Keynote Remarks at the #Solutions2020 Policy Forum, Georgetown University Law Center, at 5 (Oct. 19, 2016) ("#Solutions2020 Keynote") ("W]e must ensure that the benefits of high-speed wireless broadband reach all communities, including those Americans who continue to rely on 3G service.").

[5] Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center (Apr. 1, 2015), http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.

[6] *See, e.g.*, Next Generation Mobile Networks Alliance, *NGMN 5G White Paper*, at 41 (Feb. 17, 2015), https://www.ngmn.org/uploads/media/NGMN_5G_White_Paper_V1_0.pdf V1_0.pdf ("densification will be an important approach to deliver substantial data rate and capacity gains"); Small Cell Forum, *Small Cells and 5G Evolution: A Topic Brief*, at I (June 9, 2015), http://scf.io/en/documents/055_Small_cells_and_5G_evolution_a_topic_brief.php (5G, the future of mobile broadband, "will involve ever-smaller cells, whether to support dense zones of high capacity, or ever-increasing data consumption indoors"); *cf.* Sundeep Rangan *et al.*, *Millimeter-Wave Cellular Wireless Networks: Potentials and Challenges*, 102 Proceedings of the IEEE No. 3 (Mar. 2014), http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=6732923 (describing the promise of small cell deployment to open up millimeter wave broadband deployment in urban environments).

impede access to public rights of way is imperative. Just as rights of way have served the public by making available other essential services like water and electric power, they now can serve the public by making broadband, the newest essential service, available to all.

Courts have observed that local governments' *de facto* monopoly control over public rights of way creates the "danger that local governments will exact artificially high rates" for the use of public rights of way.[7] That danger is precisely what is occurring today across the nation, as many localities are leveraging the growing demand for wireless broadband and the corresponding need for new infrastructure to impose excessive rights of way fees. While some communities are working cooperatively with providers and impose relatively low fees, often no more than $100 for access to a streetlight of utility pole for attaching equipment, others are demanding thousands of dollars in up-front application fees, plus thousands of dollars for each pole as well as additional charges for deploying fiber or other backhaul. Given that small cells and new spectrum bands that will increasingly be used for wireless broadband require multiple sites, these fees when imposed city-wide can run into the hundreds of thousands of dollars, far exceeding any possible costs to localities for approving permits and managing their rights of way. Many require these high fees to be paid every year, often with mandatory annual escalations, which can result in rights of way charges of millions of dollars over time. These charges comprise a major component of deployment costs, undermining deployment incentives in these communities and the public interest.[8]

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[7] *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002); *see also Puerto Rico Tel. Co. v. Municipality of Guayanilla,* 283 F. Supp. 2d 534, 544 (D.P.R. 2003), *aff'd* 450 F. 3d 9 (1st Cir. 2006).

[8] Local governments may contend that they are serving their residents by collecting more revenues through high rights of way charges but, as the Commission has made clear, this position ignores the broader interests at the core of Section 253. *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253,*

Reaping the promise of wireless broadband and now 5G requires massive investments in cell sites, backhaul, and transport facilities, as well as access to rights of way for building that infrastructure. Mobilitie, the nation's largest privately held wireless infrastructure provider, is making those investments. The company builds microwave, fiber, and other facilities to supply backhaul and transport to other carriers, principally on new or existing poles along roads and other rights of way. It also constructs small cells and WiFi networks in rights of way for use by wireless carriers. For Mobilitie and other firms that will lead the national effort to invest in the nation's wireless future, rapid access to rights of way at reasonable and nondiscriminatory prices (as promised by Section 253) is critical. Conversely, excessive and discriminatory rents, fees and other charges threaten to impede those investments and slow the deployment of essential wireless infrastructure. High charges imposed by localities can also make the competitive provision of new services cost-prohibitive, suppressing new entry and competition.

Commission action interpreting Section 253(c)'s limits on rights of way charges is particularly imperative given that the National Public Safety Broadband Network, "FirstNet," plans to launch next year. Congress created FirstNet in the 2012 Spectrum Act to provide a comprehensive state of the art national wireless network for the nation's public safety agencies.[9] The heart of FirstNet's plan is to construct or lease capacity on radio access networks, backhaul, and transport facilities nationwide, working with contractors which will likely include wireless

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Memorandum Opinion and Order, 12 FCC Rcd 21396, 21442 ¶106 (1997) ("Each local government may believe it is simply protecting the interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. We believe that Congress' recognition of this fact was the genesis of its grant of preemption authority to this Commission . . . . As a result, where relations among telecommunications providers would be affected, or where the rates, terms, and conditions under which telecommunications service is offered to the public are dictated by an [sic] local ordinance, is of considerable concern to this Commission.").

[9] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156.

carriers and infrastructure providers. FirstNet's vision is to provide local public safety agencies with immense new data capabilities in order to respond to the emergencies that constantly occur in cities and rural communities across America. But achieving that vision will depend on dense deployments of many sites across localities, which will in turn require extensive new backhaul and transport capacity. It is not feasible for FirstNet to accomplish its objectives without access to rights of way for its sites at reasonable and nondiscriminatory rates. Commission action interpreting Section 253(c) will directly assist FirstNet and in turn help fulfill Congress's public safety objectives.

To achieve its cardinal goal of preventing barriers to the deployment of new services, Section 253(c) limits the charges states and localities may impose for rights of way access. Such charges must be "fair and reasonable compensation" for the use of that public resource, and must also be "competitively neutral and nondiscriminatory." And they must be "publicly disclosed" by governments, so that they are transparent to the public and to carriers. These phrases are not specifically defined in the Act or the Commission's Rules. By clarifying them, the Commission will prevent excessive and discriminatory rights of way charges from impeding the deployment of critically needed wireless services, which soon will include 5G technologies. It will thus promote Congress's broader goal of accelerating deployment of ubiquitous wireless broadband services.

For all of these reasons, the Commission should exercise its authority to interpret Section 253(c) to fulfill that provision's core purpose and expedite the deployment of wireless broadband services that will reach all Americans.[10] It should declare that:

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[10] Mobilitie is not asking the Commission to address state laws that identify the types of entities authorized to access rights of way or that delineate the respective roles of state, county and municipal governments in managing rights of way. Nor is it seeking preemption of any specific state or local law or

- "Fair and reasonable compensation" means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way. Additional charges or those not related to actual use of the right of way, such as fees based on carriers' revenues, are unlawful.

- "Competitively neutral and nondiscriminatory" means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access. Higher charges are discriminatory and therefore unlawful.

- Localities must disclose to a provider seeking access to rights of way the charges that they previously assessed on others for access.

II. NEW WIRELESS BROADBAND TECHNOLOGIES DEPEND ON REASONABLE AND NONDISCRIMINATORY CHARGES FOR ACCESS TO RIGHTS OF WAY.

A. Access to Rights of Way Enables Robust Wireless Deployment.

The core public policy objective that rights of way serve – to enable the deployment of services which benefit the public – is particularly applicable to wireless services. For a number of reasons, rights of way have become an indispensable component of wireless infrastructure planning, investment and deployment. *First,* they enable companies to build reliable networks with increased capacity to serve all customers given that most people live and work adjacent to a street or highway. Rights of way are also the key to expanding the availability of robust broadband to all Americans. *Second,* the significant increases in demand for 4G services are requiring wireless carriers to "densify" their networks by installing what are estimated to be hundreds of thousands and potentially millions of additional sites. Rights of way are the optimal (if not the only) way to deploy the many new sites that are needed to serve customers. *Third,* rights of way also are essential locations for backhaul and transport, which rely on a combination of wireless and fiber facilities and thus need access to streets and highways. *Fourth,* using rights

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regulation. Rather, it only seeks a ruling that addresses what constitute reasonable and nondiscriminatory – and thus permissible – fees under federal law.

of way reduces the transaction costs providers incur to negotiate with private landowners for access to individual buildings, which can involve hundreds of different leases across a geographic area. Lower costs translate directly into more investment, faster deployment, and more robust competition. These benefits are, as explained below, becoming even more critical for further expansion of wireless broadband and the deployment of 5G technologies.

In 2011 the Commission adopted a *Notice of Inquiry* "concern[ing] key challenges and best practices in expanding the reach and reducing the cost of broadband deployment by improving government policies for access to rights of way and wireless facilities siting."[11] It acknowledged the link between expanding broadband and securing affordable rights of way access, and sought comment on such questions as the following: "To what extent and in what circumstances are rights of way or wireless facilities siting charges reasonable? . . . Are there instances and circumstances in which rights of way or facilities siting charges are unreasonable? What are the appropriate criteria for determining the reasonableness of such charges?"[12] While parties submitted data on the high and discriminatory fees some localities were requiring them to pay before they could deploy new infrastructure, the Commission did not take further action. The Commission should now answer these questions. In fact, the issues it foresaw in 2011 are growing increasingly urgent given the rapidly growing demand for mobile broadband, the need

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[11] *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, 26 FCC Rcd 5384 (2011) ("*Broadband Acceleration NOI*"). *See also Connecting America: The National Broadband Plan*, at 109 (2010) ("Securing rights to [rights of way] is often a difficult and time-consuming process that discourages private investment. . . . [G]overnment should take steps to improve utilization of existing infrastructure to ensure that network providers have easier access to poles, conduits, ducts and rights-of-way. . . . The cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands.").

[12] *Broadband Acceleration NOI* at 5391.

for much denser cell sites, and the corresponding need for backhaul and transport networks to support them.

B. Wireless Technologies Need Affordable Access to Rights of Way Now More than Ever to Achieve Our Goals for Broadband and 5G Global Leadership.

On a bipartisan basis, federal telecommunications policy has been designed to increase the availability of wireless broadband (including 5G) to meet the needs of all Americans. As Commissioner Pai has said, "In order for the U.S. to continue to lead the world in wireless, we must stay focused on ensuring that providers large and small can install the antennas and other physical facilities necessary to serve American consumers on the move."[13] And Commissioner Clyburn has stated, "America will only truly win the 5G race if all of our citizens benefit, and it is my sincere hope as we strive to ensure competitive opportunities that we deliver ubiquitous rewards to everyone."[14]

Networks to support small cells such as the ones Mobilitie is constructing will be a cornerstone of 5G deployment. To take advantage of these opportunities, however, the Commission must eliminate barriers to wireless infrastructure deployment. As Chairman Wheeler has observed:

> [T]he nature of 5G technology doesn't just mean more antenna sites, it also means that *without* such sites the benefits of 5G may be sharply diminished. In the pre-5G world, fending off sites from the immediate neighborhood didn't necessarily mean sacrificing the advantages of obtaining service from a distant cell site. With the anticipated 5G architecture, that would appear to be less feasible, perhaps much less feasible. Furthermore, the nature of the technology makes the review and approval by community siting authorities, and the associated costs and fees, all the more critical. There are just over 200,000 cell towers in the U.S., but there

[13] FCC Commissioner Ajit Pai, Statement on the Removal of Regulatory Barriers to Small Cell Deployments, at 2 (Aug. 8, 2016).

[14] *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services,* Report and Order 31 FCC Rcd 8014 (2016) (*"Spectrum Frontiers Order"*) (Separate Statement of Commissioner Mignon Clyburn at 2); *see also* Separate Statement of Commissioner Jessica Rosenworcel at 1.

> may be millions of small cell sites in the 5G future. If siting for a small cell takes as long and costs as much as siting for a cell tower, few communities will ever have the benefits of 5G.[15]

Commissioner Pai has sounded this same concern:

> Future 5G technologies will require "densification" of wireless networks. That means providers are going to deploy hundreds of thousands of new antennas and cell sites, and they are going to deploy many more miles of fiber to carry all of this traffic. Without a paradigm shift in our nation's approach to wireless siting and broadband deployment, our creaky regulatory approach is going to be the bottleneck that holds American consumers and businesses back. The upshot of all this is that we need to make it easier for ISPs to build, maintain, and upgrade their networks—and ultimately make broadband more affordable and accessible to all Americans.[16]

Commissioner O'Rielly has also noted that, "[t]o ensure timely and cost-effective 5G deployment, the Commission must be prepared to step in and move the siting process forward by using the existing authority provided by Congress, and affirmed by the courts, to hold localities accountable for their review processes and ultimate decisions."[17] And Commissioner Clyburn recently stated: "Lack of affordability remains one of the larger barriers to connected communities in this country . . . . Streamlining deployment is central to this effort. We must ensure that all providers are able to deploy and upgrade their infrastructure at the lowest cost and quickest pace."[18]

Recent statistics justify these concerns. According to Cisco's most current VNI Mobile Forecast with respect to the United States:

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[15] FCC Chairman Tom Wheeler, Remarks at the CTIA Super Mobility Show 2016, at 4 (Sept. 7, 2016).

[16] FCC Commissioner Ajit Pai, Remarks at the Brandery: "A Digital Empowerment Agenda," at 2 (Sept. 13, 2016).

[17] FCC Commissioner Michael O'Rielly, Remarks Before Hogan Lovells' Technology Forum: "The 5G Triangle," at 2 (May 25, 2016).

[18] #Solutions2020 Keynote at 4.

- mobile data traffic will grow six-fold from 2015 to 2020, a compound annual growth rate of 42%;
- mobile data traffic will grow two times faster than U.S. fixed IP traffic from 2015 to 2020;
- mobile data traffic in 2020 will be equivalent to six times the volume of the entire U.S. Internet in 2005; and
- the average mobile connection speed will double from 2015 to 2020, reaching 16 Mbps in 2020. [19]

The staggering growth in traffic will eventually outpace network capacity, absent the further densification of networks made possible by billions of dollars in investment to build new infrastructure in local communities across the country. Greatly increased backhaul and transport capacity, as well as "last-mile" capacity through additional cell sites, is critical. As Commissioner Rosenworcel noted in supporting the Commission's allocation of new spectrum bands for 5G, "While these superhigh signals carry a significant amount of data, they don't go far. But we can turn this limitation into a strength by combining these frequencies with small cells packed close together, densifying networks at lower cost. This all works – if we come up with policies and practices that facilitate small cell deployment." [20]

Rights of way are ideal – but also essential – for small cell and 5G technologies, as well as for the backhaul and transport facilities that connect them to all carriers' networks, allowing customers to enjoy nationwide connectivity. Much like mobile devices, wireless infrastructure is evolving toward extremely small equipment that can easily be located on streetlights and utility poles that already occupy rights of way, as well as on structures supporting signage and traffic control equipment. The reduced size and weight of small cell equipment generally does not pose loading problems for most rights of way structures. Many types of small cell antennas extend no more than a few feet in any direction; some are now nearly as small as a laptop.

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[19] Cisco, *VNI Mobile Forecast Highlights, 2015-2020*, http://www.cisco.com/assets/sol/sp/vni/forecast_highlights_mobile/.

[20] *Spectrum Frontiers Order* (Separate Statement of Commissioner Jessica Rosenworcel at 2).

Access to rights of way is also more essential for small cells and the transmission facilities that connect them than it has been for 3G and 4G macrocells. The higher-frequency radio spectrum bands that carriers will increasingly depend on for small cells and 5G can supply needed network capacity. However, these bands' propagation limitations require more closely-spaced infrastructure. There is often no practical way to deploy this infrastructure without using public rights of way. And every small cell site must be connected to networks through backhaul and transport facilities so that customers can send and receive communications to or from anywhere. Given the enormous capacity demands being placed on networks, fiber may be the only cost-effective choice in urban areas. Fiber supplies the bandwidth needed to accommodate explosive data growth for many years, avoiding the need to repeatedly install new conduit. But installing fiber is not technically feasible or financially viable without access to rights of way. If carriers and infrastructure providers are charged exorbitant rents or fees for that access, fiber deployment will be deterred.

In short, robust and ubiquitously available wireless broadband depends on affordable access to rights of way. By granting this petition, the Commission will give force to the core purpose of Section 253. And it will prevent excessive fees that are impeding providers from building the infrastructure that will help make wireless broadband for all Americans a reality.

C. High and Discriminatory Fees Are Impeding Deployment of Infrastructure Needed to Support Wireless Broadband.

Mobilitie and other providers are spearheading the wireless industry's expansion of network capacity to accommodate ever-growing customer demands for advanced technologies. These companies pay enormous up-front costs to construct and expand their networks, long before they can generate revenues from those networks. The economics of deployment are, however, made far more difficult when localities impose excessive fees as a precondition for

deployment. As Commissioner O'Rielly stated at the Commission's May 3, 2016 workshop, "I continue to hear legitimate complaints about localities placing hurdles in front of small cell deployments. Issues range from permitting problems and excessive fees to forced tolling agreements and *de facto* moratoria. Site approvals in rights-of-way, which are especially important for small cell systems, appear to be particularly problematic."[21] In recent testimony to Congress, he expanded on his concerns:

> One area that the Commission, and perhaps Congress, can provide greater assistance is removing barriers to the wireless infrastructure necessary to deploy 5G. As I have previously outlined, experts estimate that the propagation capabilities (short distances) will require a ten-fold or greater siting of wireless towers and antennas. Some have argued that we may see a million new small cells and DAS antennas deployed in the next five years. All of this infrastructure can't be sited without approval of decision makers, including private land owners and municipal managers.
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> Standing in the way of progress, however, are some localities, Tribal governments and states seeking to extract enormous fees from providers and operating siting review processes that are not conducive to a quick and successful deployment schedule. At some point, the Commission may need to exert authority provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.[22]

Mobilitie's experience validates these concerns. It holds authorizations from state public utility commissions nationwide to provide telecommunications services, and has filed thousands of applications for permits or franchises in nearly all 50 states. Those applications cover tens of thousands of individual sites to be located in rights of way that include antennas, fiber, electric power supply, and other equipment. Some localities recognize the public interest benefits in

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[21] FCC Commissioner Michael O'Rielly, Statement at DAS and Small Cell Solutions Workshop (May 3, 2016).

[22] FCC Commissioner Michael O'Rielly, Statement Before the Senate Committee on Commerce, Science, and Transportation, "Oversight of the Federal Communications Commission," at 1-2 (September 15, 2016).

granting Mobilitie affordable access to rights of way to bring advanced services to their residents. These communities have worked cooperatively with Mobilitie and charge reasonable fees. For example, Mobilitie has concluded rights of way agreements with small up-front or annual fees ranging from $80 to $750 with the cities of Los Angeles and Anaheim, California; Minneapolis, Minnesota; Overland Park and Olathe, Kansas; Independence, Missouri; Newark and Union City, New Jersey; Bismarck, North Dakota; Price, Utah; and Racine and Wauwatosa, Wisconsin.

Many other localities are, however, requesting multiple, exorbitant fees that unlawfully discriminate against wireless technology and impair new or improved service. In Mobilitie's experience, these fees are orders of magnitude higher than what other localities charge – even ten times as much – and also far exceed a locality's charges to defray its reasonable costs of processing permit applications and managing its rights of way. Mobilitie believes these fees are materially higher than what other rights of way users have been charged, although, as discussed below, information as to what other users are paying is difficult to obtain.[23]

These high charges are particularly unjustified because equipment for new wireless technologies is often *less* intrusive than equipment for older wireline or wireless services. The regulatory approval process for these types of new wireless facilities should be faster and *less* burdensome, not slower and more expensive.

Commentators have noted the growing problem of high rights of way fees and have asked the Commission to address it:

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[23] Some localities are requiring Mobilitie to pay a revenues-based "franchise fee." But franchise fees are typically required when a locality awards a special privilege or exclusive right. In contrast, the agreements that Mobilitie is being asked to execute declare that Mobilitie is only being granted "non-exclusive" access, and that the locality may "franchise" an unlimited number of other providers – and collect revenues-based fees from each of them as well.

> Many LGUs [local government units] have recognized that communications are a beneficial service and crucial for economic development and, thus, they have allowed carriers to occupy the PROW [public rights of way] in return for one time permit charges or similar fees that are limited to recovering the cost of PROW management and maintenance. Other LGUs have seen the opportunity for a large and continuous revenue source, and they have used their monopoly control over the PROW to extract large fees that are used to subsidize other LGU services.[24]

Noting that broadband is "becoming an essential service" and that both "the Bush and Obama administrations have established accelerated broadband deployment as a national priority," this analysis concluded that high rights of way charges interfere with that priority: "To upgrade and build out their networks, carriers naturally need increased access to the PROW. LGUs that seek to subsidize other government services by charging revenue generating PROW fees are a formidable obstacle to that goal."[25]

"Given the importance of ubiquitous expansion of 4G and the rollout of 5G to our economic future, it's not reasonable for localities to view cell site deployment as a potential new revenue stream, which is something we've seen."[26] The problem is not confined to a few outlier localities – it exists nationwide. Across the country, Mobilitie is being confronted with multiple fees, often being asked to pay not only up-front fees but also annual recurring fees which escalate by mandatory amounts year after year. Worse, cities are requesting these fees not only for new poles or for attachments to city-owned light poles, but also where Mobilitie would install its equipment on a private utility's poles, even though there is no cost to the city from that installation and no new use of its rights of way. Types of fees include:

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[24] Thomas W. Snyder and William Fitzsimmons, *Putting a Price on Dirt: The Need for Better-Defined Limits on Government Fees for Use of the Public Right-of-Way Under Section 253 of the Telecommunications Act of 1996*, 64 Fed. Comm. L. J. 137, 138-39 (2012) ("Snyder & Fitzsimmons").

[25] *Id.* at 140.

[26] FCC Chairman Tom Wheeler, Remarks at the Competitive Carriers Association, at 5 (September 20, 2016 ("Wheeler CCA Remarks").

Application fees. Localities seek up-front fees to process any permit applications while reserving discretion to deny any or all permits. These fees are typically in the $1,000 - $3,000 range but can be far higher. For example, a Minnesota locality demanded a $10,000 up-front processing fee and a California city requested an $8,000 "administration fee," but neither locality explained how it calculated this amount or how it possibly reflected costs to process the application. These fees are problematic because they often are not *in lieu of* per-pole or per-site fees but are instead *in addition to* them, further driving up carriers' up-front costs.

Annual per-pole fees. In addition, every locality is seeking a separate fee for each and every facility Mobilitie constructs. These fees do not serve to compensate the city for processing Mobilitie's applications because those costs will already be recouped through the up-front application fees. Localities do not explain or justify annual per-pole fees as compensating them for the management of the rights of way, supervision of Mobilitie's operation, or other ongoing costs. Instead, the fees appear to be set to recover what localities believe the "market" rate is for the use of their rights of way so that they can profit from it. This results in huge variations in what Mobilitie is being asked to pay from city to city. And, because cities typically demand that the first year's fee be paid as a condition of granting a permit to construct a site, Mobilitie must pay the fee long before it can generate any revenues from its use. By adding to Mobilitie's up-front costs, these fees make the financial case for expanding service even more difficult. Examples of such high fees include:

- A Wisconsin city has requested annual fees of $30,000 for each pole.
- Two Oregon cities have requested payments of $6,083 and $5,000 annually for each pole.
- One California city initially proposed annual fees of $14,000 per pole. When Mobilitie objected the city reduced the fees to $4,000, justifying that number because a nearby city had charged $4,000. This pricing behavior signals that cities are setting fees not to

compensate them for managing the rights of way, but to collect as much as other cities are receiving or as much as the market can bear.

- Two other California cities are demanding annual fees of $10,800 and $7,210 per pole respectively.

- A Texas locality requested a $20,000 annual per-pole fee for new poles. Mobilitie proposed a lower amount but the city refused to accept it, forcing Mobilitie to limit its planned deployment to attaching equipment to existing poles. Even for simple attachments the city is demanding $2,000 annually for each pole, even where the attachment would require no disturbance of the underlying right of way.

- An Illinois jurisdiction is requesting a $12,000 annual per-pole fee.

- A New York locality imposed a blanket fee of $45,000 per year that is not tied to the number of poles Mobilitie constructs and thus bears no relationship to actual use of the rights of way.

It bears emphasis that these and other charges localities demand are "unit" fees, which must be paid for *each* small cell site. But small cell deployments may require dozens or even hundreds of sites to provide needed capacity and coverage, meaning that these fees skyrocket. A $5,000 per-site fee for a 100-site deployment translates into $500,000 in fees per year.

The magnitude of many rights of way fees materially impacts the economics of small cell and backhaul deployment, because those fees are so high in relation to other buildout costs and comprise a large percentage of those costs. The harmful impact of these fees is compounded because they are recurring fees that must be paid to the locality every year, meaning that over time they can far exceed all other deployment costs. Depending on the type of equipment used, the installation of a new pole can cost from $15,000 to $30,000. With some localities imposing per-site permit application fees of several thousand dollars, plus annual fees in that range as well, up-front fees can comprise 20-30 percent or more of total construction costs. But those up-front fees only are part of the payments Mobilitie must make. Because it typically also must pay the per-pole fee every year – and that fee is almost always subject to mandatory annual percentage

escalations – the financial burden that local fees impose is exacerbated. Thus, for example, an annual $3,000 fee will cost well more than $30,000 for *each* installation over ten years, which can far exceed the entire costs of deployment. Such fees can make deployment financially nonviable, effectively preventing deployment of new service.

Percentage-of-revenues fees. Other localities demand that Mobilitie pay a percentage of its annual gross revenues, with required fees as high as six and seven percent (requested by localities in Oregon and Washington). Jurisdictions in California, Massachusetts, and New York, as well as other jurisdictions in Oregon, are requesting that Mobilitie pay them five percent of its gross annual revenues. These fees, which can exceed what localities can charge cable providers under federal law, by definition bear no relationship to Mobilitie's actual use of the rights of way. Such a substantial tax directly affects Mobilitie's ability to finance projects in those communities.

Fiber fees. Where Mobilitie seeks to lay Ethernet or other fiber in rights of way to transport traffic from its pole-based equipment to carriers' core networks, cities also request a per-foot fee. These fees vary tremendously. While some jurisdictions in states including Kansas, New York, Minnesota and Utah charge fees ranging from $0.19 to $1.08 per foot per year, other cities are requesting per-foot charges orders of magnitude higher. For example, several Texas cities have sought fiber fees based on the fair market value of adjacent private property – even though they would not be granting Mobilitie any title or other private property rights that property owners enjoy. Such "fair market value" fees drive up the costs of fiber to prohibitive levels, deterring the deployment of new fiber capacity needed to accommodate growing broadband traffic.

Third-party manager fees. Some localities are entering into exclusive contracts with private companies to manage their rights of way. Some of these firms compete with other companies deploying network infrastructure. Under these arrangements, the private manager is empowered to negotiate rent and other fees from carriers and keep a share of the profits. This practice results in fees that by definition do not only compensate the city but also pay a private party, without any relationship to Mobilitie's actual use of the rights of way. Chairman Wheeler has criticized this growing practice: "It's not reasonable for cities to 'franchise' their siting to a third party, who acts as a gatekeeper."[27]

The plethora of different and often multiple fees demonstrates that many localities are using their authority to manage rights of way as a pretext for raising revenue, regardless of Section 253(c)'s mandate for "fair and reasonable compensation" that is "competitively neutral and nondiscriminatory." And, because these fees must be paid in advance, they are particularly burdensome for a new entrant such as Mobilitie, who must pay them in addition to fronting the costs of equipment and construction, long before it can expect to generate revenue. This often creates an untenable situation that leaves Mobilitie with the dilemma of acceding to a municipality's unreasonable demands or not deploying in that municipality at all. These profit-generating regimes also frustrate the Commission's efforts to accelerate broadband deployment and foster the entry and growth of new competitive services.

[27] Wheeler CCA Remarks at 5.

III. A DECLARATORY RULING WILL ACHIEVE SECTION 253(c)'S OBJECTIVES BY CLARIFYING ITS APPLICATION TO RIGHTS OF WAY CHARGES.

A. The Commission's Clarification of Section 253(c) Is Needed Now.

In the Telecommunications Act of 1996, Congress directed the FCC to promote rapid deployment of telecommunications services and promote competition by outlawing state and local requirements that deter the deployment of those services. Section 253(a) provides, "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." While Section 253(c) preserves the rights of municipalities to charge access fees for their rights of way, those rights are expressly limited:

> Nothing in this section affects the authority of a State or local government to manage the public right-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Thus Section 253(c) requires that any charges localities impose must be limited to "fair and reasonable compensation" and be imposed "on a competitively neutral and nondiscriminatory basis." The charges described above clearly violate Congress' directive because they are not tied in any way to actual costs of issuing permits and managing rights of way.[28] Instead they confirm that localities are leveraging their control over the public streets to raise revenues and profit from that control – precisely the incentive to impose "artificially high rates" that courts have invalidated.[29]

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[28] *See* discussion in Section IV.A, *infra.*

[29] *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d. Cir. 2002).

Given the vital importance of new wireless infrastructure to achieving the national policy objective of universal broadband availability, and the threat that unreasonable and discriminatory charges pose to that objective, the Commission should provide guidance on how Section 253(c) applies to rights of way charges.[30] To facilitate the nationwide deployment of densified infrastructure in rights of way, the Commission should lay down "markers" that will provide more certainty to localities and carriers as to what charges Section 253(c) does and does not allow. Guidance will yield significant benefits:

- It will help to stop localities from imposing charges designed not to cover costs but to profit from the public's growing demand for more and faster wireless services.
- It will resolve many of the controversies over charges that have delayed infrastructure deployment and consumed resources of localities and carriers. Both will benefit from Commission guidance that sets metes and bounds for those charges.
- A mandate from the Commission can have broad, national impact, providing clarity to all affected parties. It is a far more efficient and effective remedy than case-by-case adjudications and better fits the national need for prompt action.
- It will provide guidance to courts when they adjudicate claims that localities have violated the requirements of Section 253.

B. A Declaratory Ruling Is the Right Course to Provide the Needed Guidance.

A declaratory ruling clarifying the application of Section 253(c) would square with Commission precedent. Historically the Commission has issued declaratory rulings to provide interested parties with guidance as to their respective obligations under the Act or the Commission's rules, particularly where conflicting interpretations or other factors have created uncertainty. Declaratory rulings efficiently provide certainty to all affected parties across the

[30] *See, e.g.*, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (interpreting the statute's phrase, "reasonable period of time").

entire country, rather than the piecemeal approach of court adjudications. For example, the Commission issued a declaratory ruling to "clarify statutory rights under Section 251 of the [Act], in light of apparently conflicting determinations in several states."[31] In another declaratory ruling the Commission noted that guidance "would be helpful to avoid future disputes."[32] Courts have also specifically noted the Commission's particular role in interpreting Section 253.[33]

The Commission has also issued declaratory rulings interpreting the Act and its rules as they apply to other wireless facilities siting issues, and grounded its action each time on achieving its goal to foster new wireless services. In 2006 it granted a petition for declaratory ruling that an airport authority's restrictions on the deployment of wireless access points was preempted by the agency's "OTARD" rule, which is intended to promote the deployment of those antennas to improve service to the public.[34] And in 2009 the Commission issued a declaratory ruling interpreting language in Section 332(c)(7) of the Act to impose "shot clocks" for local zoning action on wireless siting applications. That ruling was designed to "promote[ ]

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[31] *Petition of CRC Communication of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act*, Declaratory Ruling, 26 FCC Rcd 8259 ¶ 1 (2011) ("[O]ur decision will provide clarity and guidance to incumbent local exchange carriers (LECs), competitive providers and state commissions about the rights and obligations regarding negotiation and arbitration under Section 251."); *Time Warner Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3517 ¶ 8 (2007) (declaratory ruling clarifying that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to Section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services).

[32] *Network Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 13610, 13611 ¶ 5 (2008).

[33] *See, e.g., BellSouth v. Town of Palm Beach,* 252 F.3d 1169, 1188 n.1 (6th Cir. 2001) ("As the federal agency charged with implementing the Act, the FCC's views on the interpretation of Section 253 warrant respect.").

[34] *Continental Airlines, Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order, 21 FCC Rcd 2525 (2006).

the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks."[35]

To date, the Commission has not defined what types of rights of way access fees qualify under Section 253(c) as "just and reasonable compensation" or "competitively neutral and nondiscriminatory," or how they should be "publicly disclosed" by governments that impose them. Clarifying Section 253(c)'s application to rights of way charges will prevent disputes that frustrate and delay necessary investments in wireless broadband and 5G. As Commissioner Pai recently stated:

> [T]he FCC must aggressively use its statutory authority to ensure that local governments don't stand in the way of broadband deployment. In section 253 of the Communications Act, for example, Congress gave the Commission the express authority to preempt any state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide wired or wireless service. So where states or localities are imposing fees that are not "fair and reasonable" for access to local rights of way, the FCC should preempt them. Where local ordinances erect barriers to broadband deployment (especially as applied to new entrants), the FCC should eliminate them. And where local governments are not transparent about their application processes, the FCC should require some sunlight. These processes need to be public and streamlined.[36]

IV. THE COMMISSION SHOULD INTERPRET SECTION 253(c) TO ACHIEVE CONGRESS'S OBJECTIVE OF REASONABLE, NONDISCRIMINATORY, RIGHTS OF WAY FEES.

To prevent excessive and discriminatory fees from deterring investment and forestalling deployment of advanced wireless infrastructure, and to provide more certainty to governments and carriers as to what constitutes lawful compensation, the Commission should adopt the following three interpretations of Section 253(c):

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[35] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009).

[36] FCC Commissioner Ajit Pai, "A Digital Empowerment Agenda," at 7 (Sept. 13, 2016).

A. "Just and Reasonable Compensation" Is Appropriately Limited to a Locality's Cost of Managing its Rights of Way.

The Commission should first declare that the phrase "fair and reasonable compensation" means charges that enable a locality to recoup its reasonable costs to review and issue permits and manage its rights of way, and that additional charges are unlawful. A locality could, for example, collect a one-time fee to recover the personnel and other costs for reviewing a carrier's application for a permit or franchise to construct facilities in its rights of way. Similarly, a fee that covers the costs to supervise the construction of facilities for compliance with the terms and conditions of the permit, local building codes, liability insurance, or street excavation regulations would be reasonable. And a locality may collect recurring rental or access fees that cover its incremental personnel and other costs for monitoring the facilities (for example, to ensure they are maintained in compliance with signage and other requirements).

The Commission should declare, however, that additional charges that exceed these costs are unlawful. Thus, a locality's one-time and recurring charges and fees cannot be set at levels that are designed to raise revenues for the locality, because those charges would allow the locality to profit from its exclusive control of rights of way. Localities should not be able to seize on the nation's urgent need for a huge investment in wireless infrastructure as a new source of revenue.

The language, purpose and legislative history of Section 253 support limiting total compensation from all fees to those that are related to a locality's costs. Congress's use of the term "compensation" rather than, for example, "payments," reflects that permissible charges are only those necessary to "compensate" the locality for its costs of managing the rights of way.[37]

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[37] "Compensation" connotes payment tied to a particular expense or outlay, not an ability to collect revenue generally. Black's Law Dictionary 283 (6th Ed.) (defining "compensation" as the "equivalent in

This conclusion fits Section 253's purpose – to promote new telecom services by removing barriers (including unreasonable charges) to telecom carriers, while preserving localities' right to manage their rights of way. Allowing localities to recoup the costs to manage – but not to profit from – rights of way would fulfill the statute's objective. Conversely, allowing localities to charge whatever the market will bear would eviscerate the statutory limits.

The legislative history of Section 253(c) is consistent with determining that "fair and reasonable compensation" means fees that are related to a locality's costs. During the floor debate on this section, Senator Feinstein gave examples of the limited types of activities that localities could conduct, including "requir[ing] a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation." Nowhere did she indicate that fees could be imposed more broadly or simply to collect new revenues.[38]

This interpretation does not require the Commission to specify dollar caps or other quantitative limits on what localities can charge. Localities have varying processes for reviewing rights of way use applications, overseeing the construction of facilities, and monitoring carriers' ongoing use. Their costs of managing rights of way access and use thus vary. But the magnitude of the variation is likely to be small – and far smaller than extreme variations that currently exist. Commission guidance that provides more certainty as to permissible costs will translate into faster and more robust investment.

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money for a loss sustained"); Webster's New World Dictionary at 227 (defining "compensation" as, for example, "something that constitutes an equivalent or recompense").

[38] 141 Cong. Rec. S8172 (June 12, 1995) (statement of Sen. Feinstein); *see also* 141 Cong. Rec. S8212 (1995) (statement of Sen. Gorton) (Section 253 is a "very, very broad prohibition against state and local" regulation).

This ruling will also provide needed guidance to federal courts, which have adopted different approaches to determining when a locality's charges are "fair and reasonable." Many courts have held that rights of way fees cannot be set at a level designed to raise revenues, but must be tied to the locality's costs of managing its rights of way. For example, in *AT&T Communications of the Southwest, Inc. v. City of Dallas*,[39] Dallas attempted to charge AT&T a franchise fee equal to 4% of its gross receipts for television operations in the city. The court found that this fee was "in no way tied to AT&T's use of City rights-of-way,"[40] and that "any fee that is not based on AT&T's use of City rights-of-way violates Section 253(a) of the [1996 Telecom Act] as an economic barrier to entry."[41]

Similarly, in *Bell Atlantic-Maryland, Inc. v. Prince George's County*,[42] the court rejected the county's attempt to impose a "right of way charge" equal to 3% of a rights of way user's gross revenues. It held that "the proper benchmark is the cost to the county of maintaining and improving the right of way that the carrier actually uses."[43] The court explained its reasoning as follows:

> The crucial point . . . is that any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier under Section 253(a). . . . For the same reason, the court also believes that local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way. *Franchise fees thus may not serve as general revenue-raising measures.*

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[39] 8 F. Supp. 2d 582 (N.D. Tex. 1998).

[40] *Id.* at 588.

[41] *Id.* at 593.

[42] 49 F. Supp. 2d 805 (D. Md. 1999), *vacated on other grounds*, 212 F. 3d 863 (4th Cir. 2000).

[43] *Id.* at 818.

> . . . If local governments were permitted under Section 253(c) to charge franchise fees that were unrelated either to a telecommunications company's use of the public rights-of-way or to a local government's costs of maintaining and improving its rights-of-way, then local governments could effectively thwart the [1996 Telecom Act's] pro-competition mandate and make a nullity out of Section 253(a). Congress could not have intended such a result.[44]

In *XO Missouri, Inc. v. City of Maryland Heights*,[45] local rights of way users were initially required to pay an annual license fee equal to the greater of the fee established by the city or 5% of the user's gross revenues. Here again, the court found that the city had not met the "just and reasonable compensation" standard in Section 253(c):

> The Court adopts the reasoning supporting other courts' decisions that revenue-based fees are impermissible under the [1996 Telecom Act]. *Thus, to meet the definition of "fair and reasonable compensation" a fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights-of-way.* . . . [P]lainly a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry.[46]

In *Puerto Rico Telephone Company, Inc. v. Municipality of Guayanilla*,[47] the First Circuit similarly rejected a Guayanilla, Puerto Rico ordinance that imposed a five percent gross revenue fee on telecommunications providers for their use of the municipality's public rights of way.

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[44] *Id.* at 817 (citation omitted) (emphasis added). *See also PECO Energy Company v. Township of Haverford,* 1999 U.S. Dist. LEXIS 19409, *24 (E.D. Pa. 1999) ("Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of way."); *Qwest Communications Corp. v. City of Berkeley*, 146 Supp. 2d 1081, 1100 (N.D. Ca. 2001) ("Fees charged against telecommunications carriers must be directly related to the carrier's actual use of the local rights of way."); *N.J. Payphone Ass'n Inc. v. Town of West York*, 130 F. Supp. 2d 631, 637-38 (D.N.J. 2001) ("*N.J. Payphone*"), *aff'd*, 299 F.3d 235 (3d Cir. 2002) ("fair and reasonable compensation" is limited to "recoupment of costs directly incurred through the use of the public rights-of-way. . . . A fee that does more than make a municipality whole is not compensatory in the literal sense.").

[45] 256 F. Supp. 2d 987 (E.D. Mo. 2003)

[46] *Id.* at 994 (citations omitted) (emphasis added).

[47] 450 F. 3d 9 (1st Cir. 2006) ("*Guayanilla*").

Again, the relationship between the fee and the municipality's costs was the linchpin of the court's analysis:

> We need not decide whether fees imposed on telecommunications providers by state and local government must be *limited* to cost recovery. We agree with the district court's reasoning that fees should be, at the very least, *related* to the actual use of rights of way and that "the costs [of maintaining those rights of way] are an essential part of the equation." . . . As the district court noted in this case, "[a]bsent evidence of costs, the Court cannot determine whether the Ordinance results in fair and reasonable compensation as opposed to monopolistic pricing."[48]

The First Circuit noted that fees carriers pay to localities often represent a one-for-one loss of dollars that otherwise could be used for beneficial network investment. It also found that "market-based" pricing was not consistent with Section 253(c): "The amount that other telecommunications carriers would be willing to pay tells us more about telecommunications providers' resources and their desire to comply with local regulations than it does about why the fee chosen is "fair and reasonable compensation for the state or municipality."[49]

Other courts have considered various factors in addition to the locality's costs. In *TCG Detroit v. City of Dearborn*, the Sixth Circuit approved a 4% gross revenue fee after examining "the extent of the use contemplated, the amount other telecommunications providers would be willing to pay, and the impact on the profitability of the business."[50] In *Qwest Corporation v. City of Santa Fe*,[51] the Tenth Circuit struck down a city's fee structure that sought to capture the right of way's fair market value. While it noted that courts were split on whether fees must be

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[48] *Id.* at 22 (emphasis in original), quoting *P.R. Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 113-114 (D.P.R. 2005).

[49] *Id.* at 18-19.

[50] 206 F.3d 618 (2000). *See also City of Portland, Oregon v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1074-75 (D. Or. 2005).

[51] 380 F.3d 1258, 1272-3 (10th Cir. 2004).

cost-based or could include other factors, it found the city's fees violated Section 253 because they were not cost-based and did not meet the Sixth Circuit's test, as enunciated in the *TCG Detroit* case. Another court has noted the varying approaches to determining when a right of way fee is fair and reasonable:

> Some courts have found that the fairness and reasonableness of a franchise fee under section 253(c) depends upon a rough proportion between the fee and the extent of the use of the public right-of-way, fees other providers have been willing to pay, and the negotiating history of the parties. . . . Others, more persuasively in this Court's view, read "fair and reasonable compensation" to limit municipalities to recoupment of costs directly incurred through the use of the public right-of-way.[52]

The courts' different approaches make the Commission's interpretive guidance particularly timely and important. By clarifying that localities may recover their reasonable costs to review and approve siting permits and to manage the rights of way, the Commission will provide more certainty to localities and carriers alike as to what fees are permissible, and thereby head off disputes that might otherwise land in court.[53] It also will ensure that localities can recoup their legitimate costs, while stopping efforts to impose excessive fees that hinder wireless deployment.

Commentators have long urged the Commission to limit rights of way fees to stop localities from charging whatever they can exact from carriers. After reviewing the language and purpose of Section 253(c), one article concluded that the provision "limits municipal taxes

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[52] *N.J. Payphone,* 130 F. Supp. 2d at 637-38.

[53] As the Supreme Court has made clear, courts must defer to an agency's interpretation under the *Chevron* framework even when the agency's construction contradicts pre-existing caselaw. "[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute ... would allow a court's interpretation to override an agency's." Thus, the two-step *Chevron* analysis applies even where the courts have issued interpretations that predate the agency's, and "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005), *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

related to right-of-way use by telecommunications companies to regulatory costs."[54] Ten years later, another article noted that "courts have continuously struggled over the definition of fair and reasonable compensation," and urged the Commission to seize "the opportunity to end these inconsistent interpretations and restore Section 253 to its rightful role in the process of ensuring a fair field of play for all competitors."[55] It concluded:

> The role of government as expressed through Section 253 is to ensure that competitors meet on fair and balanced playing fields so that the best technologies and competitive strategies have the greatest opportunities to prevail. A level playing field exists when all firms pay for the actual costs they cause. Revenue-generating fees tilt the field of play and put [localities] in the position of picking winners and losers, which is the antithesis of Section 253 and the [Communications Act].[56]

The Commission should also declare that Section 253(c) does not permit fees which are based on a percentage of revenues. First, those fees are by definition not tied to a locality's costs – rather, they impose a tax based on revenues. Where a city imposes, for example, a five percent gross revenues fee, a provider with $10 million in revenues would pay an annual fee of $500,000 – whether it deploys one pole or 100 poles, or whether it deploys one mile of fiber or ten miles. Equally anomalous, a different provider with far lower revenues may use far more of the city's rights of way yet pay far less. Revenues-based fees thus fail Section 253's requirement that fees

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[54] Gillespie at 250 (2002). This article also noted that localities' demands for revenue-based fees on competitive carriers after the 1996 Act was enacted paralleled similar efforts to impose high fees on new telephone companies that sought to deploy their poles in the late 1800s and early 1900s, a practice that courts rejected: "As early as the 1880s, the United States circuit courts of appeals were striking down municipal wireline regulatory fees on the ground that they were higher than the cost of regulation and excessive as a matter of law." *Id.* at 215.

[55] Snyder & Fitzsimmons at 141-42.

[56] *Id.* at 174-75.

must be "reasonable compensation ... *for use of public rights of way*," because the amount of the fee does not relate to actual occupation of those rights of way.[57]

The Commission has doubted the legality of revenues-based fees. In *TCG New York, Inc. v. City of White Plains*,[58] the Second Circuit struck down a five percent of gross revenues fee imposed on a new carrier as unlawfully discriminatory because the fee had not been imposed on an incumbent carrier. In an *amicus* brief to the court, the Commission agreed that the city's fee was unlawfully discriminatory, but also questioned its validity under the "fair and reasonable compensation" language of Section 253(c):

> *The FCC and the United States note that a percentage of gross revenues-based fee, even if it were applied to all users of the City's rights-of-way, would still be problematic under Section 253(c).* . . . A percentage of gross revenues-based fee, even if uniformly applied, might well have no relationship to either the extent of each carrier's use of the rights-of-way or the costs it imposed on the municipality. ... Although the FCC has not addressed the specific issue, there also is serious question whether a gross revenues fee is "fair and reasonable compensation ... for use of public rights of way" within the meaning of section 253(c).[59]

B. Localities Must Assess Nondiscriminatory Charges for Similar Access to Rights of Way.

Section 253(c) also prohibits right of way charges that are not "competitively neutral and nondiscriminatory." Nearly two decades ago, the Commission stated:

> One clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of

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[57] Emphasis added. The First Circuit struck down a revenues-based fee precisely for this reason: "[T]he fee charged does not directly relate to the extent actual use of public rights of way." *Guayanilla,* 450 F.3d at 22.

[58] 305 F.3d 67 (2d Cir. 2002).

[59] Brief for the Federal Communications Commission and the United States as Amici Curiae, at 14 n.7 *TCG New York Inc. v. City of White Plains,* 305 F.3d 67 (2d Cir. 2002) (emphasis added).

> incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.[60]

The Commission should reinforce this decision by declaring that "competitively neutral and nondiscriminatory" means charges imposed on a provider for access to rights of way that do not exceed the charges that were imposed on other providers for similar access to the rights of way. Higher charges would be unlawful. If, for example, a provider were granted access to a city's streets to install poles and other equipment without an up-front permit or other charge, the city's imposition of such a charge on a new entrant would be presumptively discriminatory. If the provider were charged a certain recurring annual fee for each pole it constructs or occupies, charging a higher fee for a new entrant would also be presumptively discriminatory.

Mobilitie is not seeking a ruling that all differences in charges are *per se* unlawful. A finding of discrimination must be grounded in a comparison of the relevant charges and the reasons for them. Fees may legitimately vary where they cover dissimilar deployments, or where one deployment imposes materially greater burdens on a right of way than another. For example, a taller pole that requires more excavation for construction may require more extensive local review than a shorter pole. And different fees may be warranted when they cover different types of wireless equipment that impose different loading or excavation requirements. A locality should, however, be obligated to explain and justify any variation in its charges by showing why different facilities impose different costs on its management of rights of way.

Clarifying the phrase "competitively neutral and nondiscriminatory" in this way will be consistent with court decisions, which have invalidated rights of way charges on a new telecommunications carrier that exceed charges imposed on other carriers. For example, as

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[60] *TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21443 ¶108 (1997).

noted above, in *TCG New York, Inc. v. City of White Plains*,[61] the Second Circuit struck down a requirement that plaintiffs pay a franchise fee equal to five percent of their gross revenue, even though the fee did not apply to the incumbent provider. The court concluded that Section 253(c) "forbids fees that are not competitively neutral, period, without regard to the municipality's intent."[62] It explained its rationale for striking down the fee:

> From an economics perspective, whether fees are competitively neutral should be determined based on future costs of providing services, not sunk costs incurred in the past, because that is the playing field on which the competition will take place . . . If TCG is required to pay five percent of its gross revenues to the City and [the incumbent] is not, competitive neutrality is undermined. [The incumbent] will have the advantage of choosing to either undercut TCG's prices or to improve its profit margin relative to TCG's profit margin. Allowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals of the [1996 Telecom Act].[63]

In a recent case, *Zayo Group, LLC v. Mayor and City Council of Baltimore*,[64] the city nearly tripled the plaintiffs' conduit fee to $3.33 per linear foot (while the incumbent was only paying $0.07 per linear foot to lease space under the public right of way). Moreover, the plaintiffs were forced to use the city's conduit and pay the associated fee (while the incumbent was permitted to own and operate its own conduit). The Court found that the plaintiffs had sufficiently pleaded facts showing that the City's increase in fees had a prohibitive effect on their

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[61] 305 F.3d 67 (2d Cir. 2002).

[62] *Id.* at 80.

[63] *Id.* at 79 (citation omitted). In *Dearborn*, the city was precluded by state law from charging the plaintiff and the incumbent the same franchise fee. The Sixth Circuit held that the city's fee thus did not violate Section 253(c), but the Second Circuit in *TCG New York* disagreed: "§ 253 does not limit municipalities to charging fees that are "competitively neutral" to the extent permitted by state law; it forbids fees that are not competitively neutral, period, without regard to the municipality's intent. . . . Moreover, the Sixth Circuit's statement that [the plaintiff] failed to show that [the incumbent] was undercutting competitors and creating a barrier to entry misses the point that fees that exempt one competitor are inherently non 'competitively neutral,' regardless of how that competitor uses its resulting market advantage." *Id.* at 80.

[64] 2016 U.S. Dist. LEXIS 77700 (D. Md. 2016).

provision of telecommunications services and thus violated Section 253(a).[65] Turning to Section 253(c), the Court stated that "plaintiffs have pleaded sufficient facts showing that the City treated [the incumbent] and plaintiffs differently even though they were in the same telecommunications market."[66] Further, "because the City's alleged discrimination in favor of [the incumbent] may prevent 'rough parity' between competitors, plaintiffs have plausibly shown that the City's actions do not qualify for the § 253(c) safe harbor."[67]

To Mobilitie's knowledge, however, neither the Commission nor any court has addressed how Section 253(c)'s anti-discrimination mandate applies to *wireless* services. The Commission should do so now. Indeed, in some markets Mobilitie is paying far higher charges than other carriers – even though its facilities impose a smaller physical burden on the rights of way because they do not require overhead wires and incidental equipment required for wireline deployments. The Commission should adopt a declaratory ruling clarifying the application of Section 253(c) to discriminatory rights of way charges, and prohibiting charges that exceed those that were previously imposed on other carriers for similar rights of way access.

C. Localities Should Disclose Their Charges on Other Carriers Which Were Given Rights of Way Access.

Section 253(c) imposes one additional pertinent requirement: It authorizes state and local governments to collect reasonable and nondiscriminatory charges for the use of their rights of way, "if the compensation required is publicly disclosed by such government." To give force to this language, as well as to the substantive limits on permissible compensation, the Commission

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[65] *Id.* at *16; *see also id.* at *17, quoting *Qwest*, 380 F.3d at 1271 ("[T]he City's more than tripling of fees may have constituted a 'massive increase in cost' that materially interfered with plaintiffs' ability to provide communications services.")

[66] *Id.* at *20.

[67] *Id.* at *21, quoting *TCG New York Inc.*, 305 F.3d at 80.

should declare that localities must at least disclose to a carrier upon request the charges they have imposed on all carriers for access to rights of way. That disclosure should include not only the amount of the charges but how they are calculated – for example, on a per-foot basis – and whether they are one-time or recurring.

Transparency in these charges is essential and in the public interest, as well as compelled by Section 253(c)'s language. All competing providers should be able to learn what charges localities have imposed over time for access to rights of way, and what have paid for particular types of access. For example, if a locality seeks to impose a license fee, it should disclose the amount of the fee and whether it previously assessed such a fee on other providers. If the locality seeks to impose a per-pole rental fee or other recurring charge, it should disclose whether it assessed that charge on others and if so the amount. When Mobilitie has been faced with high fees, it has often been unable to determine what the locality previously charged for access. As a result it has been forced to resort to burdensome and protracted requests under state and local Freedom of Information Act laws and ordinances, which impose a patchwork of different and time-consuming procedures. Even these efforts have rarely yielded pertinent data on rights of way charges imposed on others. The entire scheme of Section 253(c) is fundamentally dependent on providers' ability to know what these charges are and who pays them. There is no lawful or public interest basis for allowing a locality to avoid disclosing the amounts other providers paid for access, and conversely there is every reason why that information should be readily available.

V. CONCLUSION

The Commission should adopt a declaratory ruling interpreting and clarifying Section 253(c) as set forth above. Specifically, it should declare that:

- Fair and reasonable compensation" means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way. Additional charges or those not related to actual use of the right of way, such as fees based on carriers' revenues, are unlawful.

- "Competitively neutral and nondiscriminatory" means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access. Higher charges are unlawful.

- Localities must disclose to a provider seeking access to rights of way the charges that they have previously assessed on others for access.

These rulings will advance the national priorities of increased and expanded broadband wireless and 5G network capabilities to meet the needs of all Americans.

Respectfully submitted,

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November 15, 2016

ATTACHMENT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF MOBILITIE, LLC

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Dated: March 8, 2017

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FEDERAL COMMUNICATIONS COMMIISION
Washington, D.C. 20554

Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF MOBILITIE, LLC

Mobilitie, LLC respectfully submits these comments on the Commission's Public Notice in this proceeding,[1] which asks for input on actions the Commission can take to expedite the deployment of wireless infrastructure. Broadband holds tremendous promise to benefit citizens in every community across the nation. Broadband is essential today to commerce and daily life; 5G will interweave mobile access through all elements of our lives. Local governments that erect regulatory barriers to advanced broadband networks forget their charter to serve their citizens. They deprive citizens, visitors, schools, organizations and businesses of the benefits that broadband can deliver. Mobilitie urges the Commission to take immediate, comprehensive actions to remove the regulatory barriers that are obstructing deployment of advanced wireless broadband networks.

I. SUMMARY

Reliable and ubiquitous advanced wireless services hold tremendous promise for the nation. But they require massive expansion of the networks needed to transmit the exploding volume of traffic at the speeds that advanced services demand. Mobilitie is ready to invest in

[1] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421, 31 FCC Rcd 13360 (WTB 2016) ("Public Notice").

constructing and operating the new, densified networks that are essential to accommodating advanced services, and many cities are welcoming that investment to create the future – wireless infrastructure in the rights of way including small cells, relay equipment and fiber.

Many others, however, are imposing exorbitant charges for access to rights of way – charges that discriminate against Mobilitie and other new entrants and deter investment. Many localities are also delaying access to the rights of way not simply month after month, but quarter after quarter. Others outright block deployment. These localities are preventing their own citizens from benefitting from advanced, robust and ubiquitous broadband services.

The Commission correctly recognizes in the Public Notice that it has authority under the Communications Act of 1934 as amended ("Act") to issue declaratory rulings and take other actions to promote critically needed investment in wireless networks. It can do so while fully respecting the legitimate role of localities in overseeing the installation of new infrastructure.

Mobilitie urges the Commission to act quickly. We have been working furiously month after month to bring the benefits of broadband to communities across the nation, yet many jurisdictions have failed to act on our site applications, preventing us from investing in new infrastructure. Others have demanded complex licensing agreements, unreasonable conditions and high fees that threaten to make many deployments cost-prohibitive. We have seen little or no progress in many jurisdictions. And every month that goes by means another month of delay in expanding the broadband networks that hold so much promise to benefit the lives of all Americans. The Commission should thus promptly issue a declaratory ruling interpreting the Act as follows:

First, it should grant Mobilitie's petition and attack the growing problem of excessive and discriminatory local rights of way fees that are severely deterring network deployment. It should interpret Section 253(c) as follows:

- "Fair and reasonable compensation" means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way. Additional charges or those not related to actual use of the right of way, such as fees based on carriers' revenues, are unlawful.

- "Competitively neutral and nondiscriminatory" means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access. Higher charges are discriminatory and therefore unlawful.

- Localities must disclose to a provider seeking access to rights of way the charges that they previously assessed on others for access.

Second, the Commission should strike down the barriers that some localities have erected which directly block deployment, or effectively accomplish that result, and thus violate Section 253(a). It can eradicate these barriers by interpreting Section 253(a) as follows:

- Localities may not enforce moratoria, either in the form of ordinances that explicitly block reviews of siting permits, or de facto moratoria in which localities refuse to act on permits.

- They may not prohibit the installation of new poles along rights of way by restricting deployments only to attachments to existing poles, or by imposing minimum distance requirements based on the location of competing providers' facilities. Such restrictions interfere with a provider's design of its network and undermine its ability to provide the most reliable, high-quality and robust service.

- And they may not require a provider to demonstrate there is a coverage gap or other business need in the area to be served by the new site. Such requirements effectively prohibit service, directly violating Section 253(a), because small cells are not installed to eliminate coverage gaps but to enhance network capacity, speeds, and reliability.

Third, the Commission should alleviate siting delays by shortening the "shot clocks" that currently apply to local review of wireless facilities. It adopted the shot clocks to set reasonable

periods of time for localities to act on applications to construct new large cell towers and collocate macrocells on existing towers. They were not designed as reasonable time periods for reviewing far less visually intrusive small cells, microcells, and the short poles those facilities are located on. There is no reason why localities cannot act on small cell permits much faster. The Commission has the authority to modify the shot clocks to reflect the realities of wireless deployment today. And, the compelling public interest in rapid deployment of essential new infrastructure to support broadband networks supplies a strong public policy basis for tightening the shot clocks. The Commission should thus issue a declaratory ruling that:

- Delay in acting on a small cell siting permit is presumptively unreasonable if it extends beyond 60 days.
- If a locality determines a provider must secure a citywide license or franchise before it can access rights of way, the shot clock applies to that process. Otherwise, cities will continue to leverage their assertion that a license or franchise is required to delay or block deployment of new infrastructure.
- The new shot clock applies to permits that seek access to rights of way and to municipal streetlight and traffic poles and other structures located in rights of way.

Each of these actions is solidly grounded in the Commission's "statutory mandate to facilitate the deployment of network facilities needed to deliver more robust wireless services to consumer throughout the United States."[2] And each of them will discharge the Commission's "responsibility to ensure that this deployment of network facilities does not become subject to delay caused by unnecessarily time-consuming and costly siting review processes that may be in conflict with the Communications Act."[3]

The Public Notice broadly asks for other actions that the Commission can take to streamline small cell siting in addition to addressing local regulatory barriers. It should reform

[2] Public Notice at 2.

[3] *Id.*

the existing procedures for tribal reviews of wireless facilities, because those procedures impose significant costs and delays that are frustrating deployment of new infrastructure. Many small cell sites are subject to tribal reviews, and some tribes leverage those reviews to demand substantial payments from applicants in return for completing or waiving those reviews. But there is no basis for tribes to seek reviews or to request fees for small cells, because when these facilities are installed in an active right of way they rarely if ever could affect tribal interests. Unlike traditional macrocells which may be constructed on undisturbed land and thus could potentially be of interest to tribes, small cells are installed along existing roads and on utility structures, where the land underneath has already been disturbed, often multiple times over many years, and thus could not implicate tribal interests. The Commission should thus reform its tribal review procedures to exempt small cells that are installed along existing rights of way.

II. RAPID AND AFFORDABLE ACCESS TO RIGHTS OF WAY IS CRITICAL TO ACHIEVE THE PROMISE OF BROADBAND.

Mobilitie was built on the vision that the United States needs a huge investment in telecommunications networks if it is to reap the benefits that broadband can deliver. It is the largest privately-held infrastructure provider in the United States, with more than 2,000 employees. It funds, installs and operates indoor and outdoor WiFi and wireless networks using small cells, microwave spectrum, and fiber. It is making substantial investments in building new telecommunications infrastructure nationwide to support the fast-growing demand for advanced wireless communications.

As Mobilitie explained in its Petition for Declaratory Ruling,[4] wireless broadband is the essential public service for the 21st Century – just as important as landline telephone networks were in the 20th Century. People increasingly depend on access to wireless broadband to get an education, to apply for a job, to obtain health care, and to learn about services their federal, state and local governments provide. It is particularly essential for those citizens who depend on wireless to stay connected, including millions of low-income citizens. New technologies and services, including 5G and the Internet of Things, will enhance the capabilities of fire, rescue and police departments to protect the safety of their communities' residents.

As the Public Notice recognizes,[5] in order to achieve the promise of broadband, new networks need to be deployed in large part along local roads and streets. They are by far the best location because every resident and every business is located close to a road. Many of the new wireless broadband technologies will rely on high-band spectrum, which has immense capacity but short signal propagation which requires closely-spaced facilities, again making the use of rights of way essential. Moreover, the network to support many of the new broadband services like connected vehicles and traffic management must be installed along those streets.

Congress too has recognized that access to state and local rights of way are essential for new communications networks, not just traditional utilities. In enacting the Telecommunications Act of 1996 which amended the Act, it prohibited barriers that impeded new services. And, it extended access rights well beyond traditional telephone utilities in order to achieve its fundamental goal of promoting new services to benefit all Americans. The Public Notice correctly observes that Congress enacted Section 253 of that Act and other laws "to address

[4] Petition for Declaratory Ruling, Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way (filed Nov. 15, 2016).

[5] Public Notice at 3-5.

concerns about state and local governments' unduly restrictive zoning rules and unfounded denials or delays in the processing of permit applications for constructing wireless facilities."[6] Congress balanced local government's traditional authority to manage its rights of way with ensuring that they would be available for new telecom services at affordable prices that would not deter investment. It thus granted rights of way access to all carriers, such as wireless providers and companies like Mobilitie which build and operate small cell facilities and the transport networks supporting other carriers.

Small cell networks are essential to accelerate broadband infrastructure for the smart cities of tomorrow. They provide the increased network capacity and speeds the many new technologies require. The possibilities are nearly infinite: remote health, education, and entertainment; efficient grid power management; remote house and office systems management; automated highway traffic management; and robust public safety communications simply start the list. This massive investment in a resilient and secure broadband future does not require government funding; it can be readily supported by the ground-breaking technology and competitive marketplace of the wireless industry. Mobilitie and other providers are ready to invest billions of dollars immediately to place millions of small cells throughout the country.

That investment is, however, being frustrated by unwarranted as well as unlawful local regulatory barriers. As Chairman Pai has stated:

> Future 5G technologies will require 'densification' of wireless networks. That means providers are going to deploy hundreds of thousands of new antennas and cell sites, and they are going to deploy many more miles of fiber to carry all of this traffic. Without a paradigm shift in our nation's approach to wireless siting

[6] *Id.* at 5.

> and broadband deployment, our creaky regulatory approach is going to be the bottleneck that holds American consumers and businesses back.[7]

Commissioners Clyburn and O'Rielly have also noted the critical importance to the public of building new networks to accommodate broadband and, soon, 5G. As Commissioner Clyburn has stated:

> Lack of affordability remains one of the larger barriers to connected communities in this country. . . . Streamlining deployment is central to this effort. We must ensure that all providers are able to deploy and upgrade their infrastructure at the lowest cost and quickest pace.[8]

And Commissioner O'Rielly has said the Commission may need to invoke its statutory authority to remove barriers to deployment:

> Standing in the way of progress … are some localities, Tribal governments and states seeking to extract enormous fees from providers and operating siting review processes that are not conducive to a quick and successful deployment schedule. At some point, the Commission may need to exert authority provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.[9]

The Public Notice acknowledges that "[t]he successful deployment of wireless networks depends in large part on how quickly providers are able to obtain the necessary regulatory approvals."[10] But the simple fact is that localities are *not* lowering barriers to reflect far less intrusive small cell technologies – to the contrary, many are raising those barriers, which take the form of burdensome requirements, greater restrictions, longer reviews, and higher fees. The

[7] FCC Commissioner Ajit Pai, Remarks at the Brandery: A Digital Empowerment Agenda, at 2 (Sept. 13, 2016) ("Digital Empowerment Agenda").

[8] FCC Commissioner Mignon L. Clyburn, Keynote Remarks at the #Solutions2020 Policy Forum, Georgetown University Law Center, at 4 (Oct. 19, 2016).

[9] FCC Commissioner Michael O'Rielly, Statement Before the Senate Committee on Commerce, Science, and Transportation, Oversight of the Federal Communications Commission, at 1-2 (Sept. 15, 2016).

[10] Public Notice at 5.

Commission rightly finds that it is time for it to address those obstacles to fulfill its statutory mandate to promote ubiquitous telecommunications networks to serve the American public.

III. MANY LOCALITIES HAVE IMPOSED OBSTACLES THAT ARE SEVERELY IMPEDING INVESTMENT IN CRITICAL WIRELESS INFRASTRUCTURE.

Mobilitie is working cooperatively with many communities to deliver available and affordable broadband services to their residents and thereby promote the objectives of the Communications Act. Many cities recognize the tremendous benefits to their citizens of using rights of way to deliver broadband, and Mobilitie is successfully partnering with them.

However, many localities are frustrating deployment and thereby impeding ubiquitous, affordable wireless broadband. They are, among other practices, imposing unreasonable, excessive and discriminatory fees that deter Mobilitie from building new infrastructure. Mobilitie thus sought relief from the Commission in its Petition, which supplies numerous examples of unreasonable and discriminatory charges. These include requirements that Mobilitie pay a percentage of its gross revenues; annual fees in the thousands of dollars for each small cell that far exceed any possible costs to the locality; and fees that are imposed on Mobilitie but not imposed on competing providers, impeding the provision of competitive new services. Section 253(c) of the Act specifically requires that in order to fit within that provision, rights of way frees must constitute "fair and reasonable compensation," be "competitively neutral and nondiscriminatory," and be "publicly disclosed." Mobilitie asked the Commission to interpret these statutory phrases consistent with their plain meaning and the goals of the Act.[11]

The Public Notice seeks comment on Mobilitie's Petition as well as on any other laws, regulations and practices that adversely affect wireless deployment. It correctly notes that while

[11] Mobilitie did not ask the Commission to preempt any specific state or local law or regulation. Rather, it only seeks a ruling that addresses what constitute reasonable and nondiscriminatory – and thus permissible – fees under federal law.

excessive and discriminatory fees are one type of barrier, there are others that can impede or block new investment, and asks for what types of such obstacles exist as well as illustrations as to how they have been imposed. Given that Mobilitie supplied numerous examples of excessive and discriminatory fees in its Petition, it will not repeat those examples here, but expects that other providers will supply many additional examples to illustrate the breadth of this problem.

Instead, Mobilitie submits these comments to respond to the Commission's request for information about additional deployment barriers. They unfortunately go well beyond exorbitant fees that impair broadband deployment, and impose barriers and extremely long procedures that delay new service or deny it altogether. Such barriers are equally unlawful, and the Commission should adopt a declaratory ruling to take them down.

A. Both Explicit and Effective Moratoria Unlawfully Block Deployment in Violation of Section 253(a).

Section 253(a) of the Communications Act is based on Congress' determination that state and local laws, regulations or practices that obstruct the deployment of telecommunications services disserve the public interest and must be curtailed. And the scope of this section is broad – it reaches not only laws or regulations that may expressly prohibit service, but also those that may "have the effect of prohibiting" services.

Moratoria on building facilities unquestionably violate Section 253(a) because they expressly prohibit new service. They have stopped Mobilitie from constructing the facilities needed for its networks. For example:

- A Florida locality enacted a moratorium prohibiting new wireless facilities in 2014, but it is still in effect three years later.
- Two other Florida jurisdictions enacted moratoria in September 2016 that remain in effect.

- An Iowa locality issued an indefinite moratorium in August 2016 on small cell permitting to develop a small cell ordinance.

- A California locality passed an indefinite moratorium in August 2016 prohibiting new wireless facilities.

- A Minnesota locality issued a moratorium in August 2016 prohibiting approval of or wireless and small cell/DAS systems without any end date.

- A Washington state locality passed a moratorium in September 2016 prohibiting the approval of any wireless facilities until at least August 2017.

Mobilitie has also confronted local practices which, while not taking the form of explicit moratoria, still have the same practical impact, because they stop it from securing the permits the locality requires and thus effectively stymie installation of new facilities. These practices take various forms, including refusals to process site permit applications, refusals to negotiate master rights of way agreements which the locality insists are a prerequisite to its willingness to process site permits, or simple inaction. Some cities say they cannot consider Mobilitie's applications until they develop an administrative review process, but then fail to create that process, leaving Mobilitie with no path forward. These failures to act have the same effect as express moratoria. For example:

- Four Arizona jurisdictions have told Mobilitie that they will not process ROW siting applications s until the state legislature determines whether to enact siting legislation.

- Two other Arizona jurisdictions have stated that they will not process applications because of this Commission proceeding.

- Approximately 30 California localities are refusing to negotiate ROW access agreements and permits, stating that they first want to acquire street lights owned by a privately-owned investor utility. Why the city's desire to acquire these facilities should block Mobilitie from securing permits has never been explained.

- Three Michigan jurisdictions will not allow deployment of facilities in their ROWs at all.

- A Minnesota locality told Mobilitie last year it will not accept small cell applications until it adopts a new ordinance for permitting small cells, but has recently stated that it will take at least another year to enact the ordinance.

- A New York city is denying ROW access for small cells because it has no permitting process in place but has not stated when that process will be completed.

- An Ohio city is denying ROW access without providing an explanation.

- An Oregon city requires a franchise agreement before it will consider small cell permit applications, but will not negotiate the franchise agreement.

- Three state departments of transportation are refusing to permit Mobilitie's facilities along highway ROWs.

Both express and *de facto* moratoria directly undercuts the purpose of Section 253(a), to ensure that localities do not block the deployment of new telecommunications services. They are accordingly unlawful.

B. Regulations or Practices that Restrict New Small Cell Facilities Also Violate Section 253(a).

Many other localities do not enforce express or *de facto* moratoria, but impose severe restrictions that effectively deter new infrastructure. The most common type of restriction prohibits Mobilitie from installing new poles in rights of way on which to attach its antennas, fiber and other necessary equipment, and allows it only to attach equipment to existing poles. Other restrictions require Mobilitie's equipment to be spaced minimal distances from other providers' facilities. Those limits preclude Mobilitie from deploying small cells at locations that are needed to provide reliable coverage. And others require Mobilitie to demonstrate a network "coverage gap," despite the fact that small cells are not intended to fill geographic gaps, but to fill "capacity gaps" where the available bandwidth is or will soon be inadequate to accommodate the exploding volume of traffic and the fast speeds customers expect. For example:

- A California locality requires all facilities to be underground, and thus will not allow Mobilitie to install new poles or even small cells attached to existing poles.

- Nearly 40 California localities require propagation maps that demonstrate the need for additional wireless infrastructure to fill a coverage gap.

- An Illinois city required Mobilitie to make a large cash deposit before it would even begin negotiations, but then refused to work with the company or even discuss an agreement.

- Another Illinois city is requiring Mobilitie to attach city-owned equipment at Mobilitie's own cost as a condition of being able to install new poles.

- Another Illinois city is conditioning ROW access on Mobilitie's waiver of its rights to seek judicial review of city permitting decisions.

- Two other Illinois cities require propagation maps in order to prove a need for new infrastructure.

- Two Michigan localities will not allow Mobility to deploy small cells because they require all telecommunications facilities to be installed underground.

- Five Minnesota jurisdictions require propagation maps that demonstrate the need for additional wireless infrastructure.

- Two Nevada counties have imposed minimum spacing requirements between small cell facilities that impair network coverage.

- Two Ohio jurisdictions require propagation maps that demonstrate the need for additional wireless infrastructure.

- Two Oregon localities require Mobilitie to provide an alternative site analysis showing why it cannot locate small cell facilities on private property.

- A number of Washington localities are requesting that applicants for new small cell facilities using ROWs demonstrate a significant gap in coverage, show why using ROWs is the least intrusive means to fill that gap, and/or produce an analysis of the feasibility of alternative sites that do not use ROWs.

These types of restriction are no more lawful than small cell siting moratoria. They effectively prohibit service in many locations, because existing poles are either insufficiently tall or have loading restrictions and cannot bear the weight of the new equipment. Alternatively, the poles are in the wrong locations to achieve reliable, robust network coverage. More

fundamentally, such restrictions impermissibly inject localities into the design of telecommunications networks. Section 253(a) grants them no such authority.

C. Many Localities Are Imposing Long Delays, First to Execute A Rights of Way Access Agreement, and Then to Process Individual Siting Permits

The Public Notice seeks information as to the length of time that localities take to process applications. It correctly notes that, given the far smaller visual and other impacts of small cells, processing times should be correspondingly faster. But in Mobilitie's experience, processing times are extremely slow – and often involve not one but two lengthy periods of delay, one following the other, and each lasting months and many well over a year. Many localities require Mobilitie to obtain a city-wide license or franchise merely to have the right to access their rights of way. However, that license or franchise is *in addition to* the city's *separate* requirement that Mobilitie secure permits for each individual site. The result is that Mobilitie must secure not only a city-wide license but also individual permits. This two-step process imposes extensive delays as well as costly and burdensome conditions that frustrate deployment.

The license or franchise agreement negotiation process is lengthy. While cities are requiring them for rights of way access, few have agreements that are designed for small cell deployments and thus must create them. These agreements are typically extensive contracts, often thirty pages or more, which impose detailed obligations and restrictions on Mobilitie, and address matters that go well beyond the locality's legitimate interest in managing its rights of way. For example, they require Mobilitie to pay a franchise fee based on a percentage of the company's gross revenues, require Mobilitie to demonstrate a business need for its service or a gap in wireless coverage, impose design requirements, or seek to regulate Mobilitie's dealings with its customers.

Over 340 jurisdictions have taken over six months to establish a process or agreement for access to the right of way – measured not from the time of first discussion but from the time a template process or draft agreement was first exchanged. Of these at least 75 localities have taken over twelve months to establish a process or agreement, and at least 11 have taken over a year and one half. At least two have taken more two years or more. And these localities do not include those that enacted moratoria that completely block new infrastructure. Examples of license agreement delays abound:

- In California, Mobilitie has been waiting for one city to move ahead with an agreement for two years, and for a second city for more than eighteen months. It has been seeking an agreement with a third city for more than one year.
- In Florida, one jurisdiction has stalled the agreement process for over two years.
- In Georgia, discussions began in one locality a year ago; no agreement is yet in place.
- In Illinois, Mobilitie began negotiations with a locality eleven months ago but was unable to get responses for months and still has no agreement.
- In Iowa, one locality notified Mobilitie ten months ago that an agreement would be required but no agreement has yet been reached.
- Similarly, a Maryland locality informed Mobilitie eleven months ago that an agreement would be required but put the agreement on hold.
- In Massachusetts, discussions with one city have been ongoing for eighteen months.

The "benefit" of the rights of way license or franchise is no more, though, than the opportunity to file permits one by one – in a work stream that can require dozens of sites for each build. In many of these jurisdictions, after Mobilitie has started to file applications for the individual permits that will finally allow it to build, it must again wait – and generally for not months but quarters – before the applications it files are granted or denied. For well over half of these facilities, the process has taken over six months, and many have been awaiting approval for over a year. This glacial pace is the result both of time working with jurisdictions as they change

or create application requirements and processes, and of delay after applications are complete. Every one of these delays frustrates deployment of needed new infrastructure to serve these communities. Examples of standard delays for eight months or more are common, and one city has a year-long permitting process:

- One jurisdiction in southern California has a permit review period of one year even following an executed ROW Access agreement.
- A northeastern jurisdiction is still reviewing applications that have been submitted without response for over eight months.
- Mobilitie submitted applications to one mid-Atlantic locality last June but is still waiting for it to act – nine months later.
- One midwest jurisdiction has been willing to work with Mobilitie on the proposed deployment, but the pace has been extremely slow pace allowing eight months to pass without any successful permitting.
- One jurisdiction in the south is working with us, but has a very restrictive and slow process requiring Mobilitie to jump through several hoops that has lasted eight months to date.
- A city in the west is requiring a very lengthy process involving environmental reviews, design commission approval, and numerous other deliverables to be first approved by the city's Department of Transportation and ultimately, the City Council; which add up to more than six months.

IV. THE COMMISSION SHOULD INVOKE ITS AUTHORITY TO REMOVE THESE BARRIERS TO BROADBAND DEPLOYMENT.

Chairman Pai has declared:

> [T]he FCC must aggressively use its statutory authority to ensure that local governments don't stand in the way of broadband deployment. In section 253 of the Communications Act, for example, Congress gave the Commission the express authority to preempt any state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide wired or wireless service. So where states or localities are imposing fees that are not "fair and reasonable" for access to local ROWs, the FCC should preempt them. Where local ordinances erect barriers to broadband deployment (especially as applied to new entrants), the FCC should eliminate them. And where local governments are not transparent

about their application processes, the FCC should require some sunlight. These processes need to be public and streamlined.[12]

The most effective and efficient way for the Commission to apply that statutory authority is to issue a declaratory ruling under Section 1.2 of its Rules, interpreting Section 253. As the Public Notice observes, the Commission unquestionably has that authority,[13] and courts have upheld its use of declaratory rulings to construe and apply the Act, including specifically to promote the deployment of new wireless services.[14] Moreover, a declaratory ruling will by definition have national impact, unlike rulings on particular disputes, and thus conserve all parties' resources. And, it will provide far more certainty and clarity to localities and providers as to their respective rights and obligations.

The Commission should address three discrete problems: Excessive charges for access to rights of way, moratoria and other barriers to deployment, and unreasonably protracted siting permit review periods.

First, it should grant the relief Mobilitie sought in its Petition. It should interpret Section 253(c) of the Act to implement the balance that Congress struck in that provision. It should ensure that localities can charge fees that fully compensate them for the costs they incur due to providers' access to rights of way, but cannot extract higher fees or impose fees that discriminate against newer providers: Specifically, the Commission should:

- Declare that the phrase "fair and reasonable compensation" in Section 253(c) means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way.

[12] Digital Empowerment Agenda, at 7.

[13] Public Notice at 6; *see* 47 C.F.R. § 1.2; 5 U.S.C. § 554(c) (an "agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.").

[14] *See, e.g.*, *City of Arlington v. FCC*, 668 F.3d 229, 247-54 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

- Declare that the phrase "competitively neutral and nondiscriminatory" in Section 253(c) means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access.

- Declare that that localities must disclose to a provider seeking access to rights of way the charges that they previously assessed on others for access.[15]

Second, it should outlaw barriers that localities have erected that block deployment of new infrastructure. Section 253(a)'s fundamental purpose is to eradicate obstacles to new telecommunications services, whether they use wireless or wireline technology.[16] It should rule that Section 253(a) prohibits not only express moratoria but also *de facto* moratoria, in which cities simply refuse to act on applications or permits to install new infrastructure. It should also declare that three specific forms of barriers localities have erected that stop new small cells and other facilities are unlawful under Section 253(a):

- Localities may not prohibit the installation of new poles along rights of way by restricting deployments only to attachments to existing poles. Such a prohibition interferes with a provider's design of its network and compromises its ability to provide the most reliable, high-quality and robust service.

- They may not impose minimum distance requirements which are based on the location of competing providers' facilities. These restrictions are not competitively neutral because they disadvantage new entrants and saddle them with restrictions that did not apply to prior applicants. And they also intrude on providers' right to design their networks to best serve customers.

- And they may not require a provider to demonstrate there is a coverage gap in the area to be served by the new site. Such a requirement effectively prohibits service in direct violation of Section 253(a), because small cells are not installed to eliminate coverage gaps but to enhance network capacity, speeds, and reliability.

[15] *See* Mobilitie Petition at 24-35 for the legal basis and rationale for each of these rulings.

[16] Section 332(c)(7)(B) of the Act contains a parallel provision outlawing state or local regulations which prohibit or have the effect of prohibiting the provision of personal wireless services, and the Commission can thus similarly address the scope of that provision in its declaratory ruling.

Third, it should shorten and consolidate the shot clocks that it previously adopted to determine when localities' delays in acting on applications for new wireless facilities constitute unreasonable day, and declare that the new shot clock applies to small cell siting along rights of way. The Commission adopted those shot clocks more than seven years ago, in 2009, when nearly all wireless facilities were comprised of macrocells, often installed on tall towers.[17] It determined that 150 days was a presumptively reasonable time period for new facilities and that 90 days was appropriate for collocations.

The Public Notice correctly observes that "[t]he presumptive timelines established in the *2009 Declaratory Ruling* may be longer than necessary and reasonable to review a small cell siting request."[18] They are in fact far too long and should be tightened. Today, nearly all wireless facilities consist of small cells and microcells, which have minimal visual impact and do not need to be located on large towers, but are typically placed on utility poles, streetlight poles or traffic signaling and signage facilities. Mobilitie urges the Commission to set a new shot clock of no more than 60 days for all small cell installations, whether they are placed on new poles or attached to existing structures. Given that the poles themselves will join other rights of way structures, there is no need for a longer review process. Sixty days is more than ample time for localities to issue a permit.

It is equally important that the Commission extend this 60-day shot clock to any and all local processes governing installation of wireless facilities in rights of way. As documented above, different local governments have very different procedures for granting access to rights of way: Some have multiple permit application processes; some require providers to secure a

[17] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009), *aff'd sub nom. City of City of Arlington v. FCC*, 668 F.3d 229, 247-54 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[18] Public Notice at 11.

license or franchise, and some require both. Most assert that unless and until the provider accepts the often onerous terms of a license or franchise, its siting permits will not be considered. The practical impact is to inject substantial delays that impede investment in new facilities and can drive away that investment altogether.

Section 332(c)(7)(B) was intended to streamline and expedite the deployment of new wireless facilities, while preserving localities' role in reviewing siting applications. That balanced approach is undermined when localities circumvent the statute's "reasonable time" requirement by subjecting providers to licensing or franchising mandates that tie them up in endless delays. The Commission should thus adopt a ruling declaring that, whatever the siting review procedures a local government may have, the same 60-day shot clock will apply to all of those procedures together. In short, a locality's failure to act on any and all licenses and/or permits it requires within 60 days will be presumptively unreasonable.

Finally, the Commission should rule that its new shot clock applies to all rights of way as well as to all local government facilities that are located in those rights of way. Given that some localities have asserted that they are under no obligation to consider, let alone grant, permits to use rights of way, it is essential that the Commission intervene. Rights of way and municipal utility poles, streetlights and traffic facilities are ideal locations for small cells. In many cases, they are the only feasible way to provide sufficient capacity because of the need for connecting to fiber and other backhaul facilities which are located under local streets. And, in cities which have required undergrounding of all private utilities, municipal facilities are the only available locations for small cells. Moreover, municipal rights of way and structures within them are public property that serves public functions; they are not in any way "private" or "proprietary" the way a privately-owned building is.

The Commission has a sufficient legal basis to adopt this ruling. Section 332(c)(7) applies to state and local "regulation" that can impede timely siting of wireless facilities, but this term is not defined. Some localities have told Mobilitie that they are acting in their "proprietary" rather than "regulatory" capacity in controlling access to rights of way and municipal poles in those rights of way. That position, however, creates a gaping loophole because, if it were correct, cities would be immune from complying with the requirements of the Act that apply to rights of way, undercutting one of the Act's key objectives. Moreover, the fact that localities typically have adopted numerous ordinances and regulations governing rights of way underscores that they are engaging in regulatory functions in managing those rights of way.

In short, the Commission should alleviate the delays that currently afflict the small cell siting process by declaring that:

- Delay in acting on a small cell permit is presumptively unreasonable if it extends beyond 60 days.
- If a locality determines a provider must secure a citywide license or franchise before it can access rights of way, the shot clock applies to that entire process. Otherwise, cities will continue to leverage their assertion that a license or franchise is required in order to delay action on permit applications.
- The new shot clock applies to permits that seek access to rights of way and to municipal streetlight and traffic poles and other structures located in rights of way.

V. CONCLUSION

For the above reasons and those set forth in Mobilitie's Petition, the Commission should take prompt and comprehensive action against the excessive fees, long delays, and other barriers that are blocking wireless broadband from achieving its many benefits to the American public.

Respectfully submitted,

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Dated: March 8, 2017

ATTACHMENT 3

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)))	WT Docket No. 16-421
Mobilitie, LLC Petition for Declaratory Ruling	)	

REPLY COMMENTS OF MOBILITIE, LLC

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REPLY COMMENTS OF MOBILITIE, LLC

I. SUMMARY

Mobilitie, LLC respectfully submits these reply comments on the Public Notice in this proceeding.[1] The record clearly supports comprehensive Commission action to dismantle the regulatory barriers impeding the deployment of needed new wireless infrastructure. The Commission should issue a declaratory ruling as soon as possible. With each passing month these barriers put infrastructure investment further behind the growth curve the country needs to lead in broadband deployment, robbing the public and our economy of the increase in jobs and economic growth that investment delivers. Smaller, slower buildouts – and in many places no broadband deployment at all – directly penalize all economic and cultural demographics: established businesses, small startups, residents, and the marginalized all suffer.[2]

[1] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie LLC Petition for Declaratory Ruling,* Public Notice, WT Docket No. 16-421, 31 FCC Rcd 13360 (WTB 2016) ("Public Notice").

[2] Commenters confirm the linkage between broadband access and economic opportunity. *E.g.*, U.S. Black Chambers Comments at 1 ("Wireless technology is an essential tool for Black businesses. No longer considered a luxury, wireless broadband has become a lifeline.… Better access to wireless networks and more seamless connectivity for all Americans has become a key part of economic opportunity in the modern world."); Latino Coalition Comments at 1.

The record supplies compelling factual and legal grounds for the Commission to remove the obstacles impeding the deployment of advanced wireless broadband networks. Mobilitie's November 15, 2016 Petition for Declaratory Ruling ("Petition") sought Commission action against one obstacle: the excessive and discriminatory fees localities are imposing on wireless infrastructure along rights of way ("ROWs"). All wireless providers and associations filing comments support Mobilitie's Petition, documenting numerous examples of exorbitant and discriminatory fees that they or their members have confronted. The data illustrate that many localities are leveraging the growing demand for ROW access and their monopoly control over that access to extract monopoly rents. Commenters also support Mobilitie's showing as to why Section 253 of the Communications Act of 1934, as amended ("Act"), supplies legal authority for the Commission to grant the Petition. And they endorse Mobilitie's three specific requests for the Commission to interpret Section 253 to ensure that ROW fees meet the Act's requirement that fees are "fair and reasonable," are "nondiscriminatory and competitively neutral," and are "publicly disclosed" so that they are transparent to all.

In contrast, parties opposing the Petition fail to contravene this substantial record. Many localities are good stewards of their citizens, recognize the economic and other benefits of new infrastructure, and exercise that responsibility appropriately by charging reasonable fees. But that does not change the fact that many others impose fees that are excessive or discriminatory, or both. Others make the incorrect claim that the Petition asks the Commission to set rates for ROW fees. To the contrary, it asks the Commission to declare that fees should be based on localities' costs so as to make them whole, not to specify fees. Some localities assert they are simply setting fees at "market," but there is no free market for ROW access. The record information as to fees confirms that localities exercise monopoly control over ROWs and setting

fees. Others assert that the Commission has no authority at all to address their control over ROW access, but that assertion is belied by Congress' decision in Section 253 to limit localities' discretion to impose requirements or restrictions on services.

Given the strong factual and legal record supporting a declaratory ruling, the Commission can – and should – act quickly. The industry has been working with cities for years, and while some cities are on the vanguard of fast deployment, far too many leverage the growing demand for new facilities to extract high fees. Since filing its Petition nearly five months ago, Mobilitie has strived to work with localities to obtain reasonable fees and secure the many required licenses and permits, but still faces the same obstacles that its Petition and all industry commenters document. Localities continue to require both up-front application and permit fees, as well as recurring, annual "rental" fees – even though they only incur one-time costs to review and process applications and to supervise installation of facilities in ROWs. Worse, some localities are sharply hiking fees to thousands of dollars to capitalize on the demand for additional infrastructure. For a deployment that requires a vast number of small cell facilities across a metropolitan area, these fees quickly mount up to hundreds of thousands of dollars, often making deployment economically infeasible. They far exceed any costs the locality incurs by orders of magnitude, while taking capital that would otherwise go to investment in new infrastructure. Yet as the race to 5G intensifies, the need for that investment to ensure the speed and optimal performance of wireless networks intensifies.

The Commission should thus promptly issue a declaratory ruling granting the Petition. That action will curb the excessive fees that are deterring investment in expanding the nation's wireless infrastructure and blocking creation of the many jobs that investment will generate. Moreover, it will speed provision of advanced services to the public, which increasingly depends

on those services. Accordingly, the Commission should interpret Section 253(c) of the Act as follows:

- "Fair and reasonable compensation" means charges for ROW application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing ROWs. Additional charges or those not related to actual use of ROWs are unlawful.

- "Competitively neutral and nondiscriminatory" means charges imposed on a provider for access to ROWs that do not exceed the charges imposed on other providers for similar access. Higher charges are discriminatory and therefore unlawful.

- "Publicly disclosed" means that localities must disclose to a provider seeking access to ROWs the charges that they previously assessed on others for access.

II. LOCALITIES NATIONWIDE ARE IMPOSING EXCESSIVE AND DISCRIMINATORY FEES THAT DEPRIVE CITIZENS AND THE ECONOMY OF THE BENEFITS OF BROADBAND DEPLOYMENT.

The Public Notice correctly states that "[t]he successful deployment of wireless networks depends in large part on how quickly providers can obtain the necessary regulatory approvals."[3] But the record establishes that localities are *not* lowering barriers to reflect far less intrusive small cell technologies – to the contrary, many are raising those barriers in the form of higher fees, new requirements, and greater restrictions. And some are hiking fees to even more exorbitant levels. Every organization representing wireless infrastructure providers and carriers, and every individual wireless carrier and provider, agrees with Mobilitie that fees are excessive, that such fees violate Section 253 of the Act, and that the Commission should interpret Section 253 to clarify what constitutes "fair and reasonable compensation" that is "nondiscriminatory and competitively neutral."

These commenters also explain why excessive and discriminatory fees disadvantage wireless providers and hurt consumers and the economy. As Sprint observes:

[3] Public Notice at 5.

> [A]ntiquated regulatory and bureaucratic hurdles are slowing the pace of this deployment and diverting millions of dollars away from critical infrastructure investment. Lack of access to right of way structures, excessive frees, and untenable processes and delays from local governments for permitting and installing small cells have become a major barrier to investment in the mobile economy.[4]

AT&T explains that localities imposing high fees drive investment elsewhere, hurting their own citizens:

> Service providers are subjected to wildly varying, arbitrary, and excessive one-time and annual fees to access ROWs and poles in the ROW, which distort their decisions about where to deploy facilities and offer advanced services. These distortions encourage service providers to deploy services for reasons other than competition and thus, impede market entry, ultimately harming consumers in both the communities charging the excessive fees and in "downstream" communities with lesser capacity demands. Excessive fees also siphon resources away from broadband deployment, often causing a service provider to abandon a small cell project, diminish the size of the project, or bypass another community.[5]

Broadband deployment generates jobs, promotes economic growth, and delivers social benefits, but only if barriers that are impeding it are removed. As the Latino Coalition observes:

> The next level of broadband innovation, and particularly the introduction of 5G wireless networks, will provide growing Latino communities across the U.S. with a whole new level of economic and social uses. Reports estimate this new platform could create as many as three million new jobs nationally and $500 billion annually to U.S. GDP. We will also see unparalleled connectivity with near instantaneous speeds and increased capacity for data. In real-world terms, these benefits cannot be overstated, especially to those who fall on the wrong side of the digital divide and depend on wireless exclusively to connect to the internet. … To fully realize these benefits and more, 5G networks must be built out. To

[4] Sprint Comments at i.

[5] AT&T Comments at 19.

> ensure that happens in a timely manner, it's imperative that there are sound infrastructure policies at the federal, state, and local levels. This entails streamlining permitting processes, establishing clear timelines for review and action, and setting reasonable fees.[6]

The record contains ample evidence of the high fees that localities demand.[7] For example, Sprint supplies a table of numerous ROW fees that exceed $1,000, as well as specific jurisdictions imposing excessive or discriminatory fees.[8] It also documents examples of "franchise" or "gross revenues" fees, explaining that these fees "are inherently unreasonable as they are unrelated to the costs of maintaining the right of way."[9] Moreover, the data from Sprint and other providers show that fees vary widely across jurisdictions, including those in the same state, underscoring that fees are not based on costs but on what localities think they can collect as "tolls" for ROW access.[10] As Verizon notes, carriers often have no choice but to pay these excessive fees if they want to be able to deploy needed infrastructure to meet network capacity needs.[11]

Mobilitie's experience confirms the data on excessive fees that other providers have put in the record. It has negotiated or is in the process of negotiating many agreements to install facilities in ROWs. Many cities have not yet proposed fee structures, as they focus on design, process or other elements first. Some jurisdictions ask for no or minimal fees (such as $100), but

[6] Latino Coalition Comments at 1.

[7] CTIA Comments at 14; AT&T Comments at 21; Sprint Comments at 25-26; CCA Comments at 16.

[8] Sprint Comments at 24-25.

[9] *Id.* at 26-27.

[10] Verizon Comments at Appendix; WIA Comments at 19; Tech Freedom Comments at 5; Conterra Broadband Services and Uniti Fiber Comments at 19-20.

[11] Verizon states that the fees present carriers with a harsh choice: "pay excessive rates (thus reducing the number of facilities the carrier can deploy), delay deployment while attempting to negotiate a fair rate, or abandon plans to locate small facilities in the jurisdiction altogether." Comments at 9.

at least 29 are imposing up-front fees of $5,000 or more, and 19 are requiring annual fees of that magnitude. Thirty-one jurisdictions are imposing one-time fees of between $2,000 and $5,000, and 43 demand annual fees in that range. Most annual fees include annual escalators of three percent or more. And in many jurisdictions there are even more annual or one-time fees on top. When multiplied by the large number of facilities needed to provide robust and reliable service to these jurisdictions, Mobilitie is facing substantial initial outlays plus outlays of hundreds of thousands if not millions of dollars over time. And those fees are over and above the substantial costs of designing, procuring and installing the facilities.

The record also shows that some localities charge fees for wireless facilities that are much higher than the fees they charged other ROW occupants, underscoring that ROW fees to wireless providers are discriminatory as well as untethered to localities' costs.[12] As T-Mobile notes, "Many localities request fees that unlawfully discriminate against wireless technology, resulting in the impairment of new or improved service."[13]

The record also demonstrates another type of excessive and discriminatory charge: revenues-based fees, such as a certain percentage of a provider's gross revenues. Such fees should be found to be *per se* unlawful because they do not relate at all to a jurisdiction's costs or to the extent that a provider actually deploys facilities in ROWs, and thus cannot be

[12] Verizon Comments at 8-10, Appendix; Conterra Broadband Services and Uniti Fiber Comments at 8; 21-22 ("it is common to encounter schemes requiring that CFPs pay double what incumbents pay for the same access to right-of-way"); Crown Castle Comments at 14 ("Many other jurisdictions discriminate against right-of-way small cell installations while permitting infrastructure for other utilities in the same zones"); WISPA Comments at 7-8.

[13] T-Mobile Comments at 10.

"compensation" permitted by the Act. As T-Mobile states, revenues-based fees "are clearly unrelated to application review and are solely employed to generate revenue."[14]

The problem of excessive fees is growing worse. Since Mobilitie filed its Petition, it has faced requests from some localities to pay far more than those same localities had initially demanded. The reason for steadily increasing fees is obvious: localities realize that the demand for ROW access to build and install infrastructure is rapidly growing, and are capitalizing on that demand by insisting on ever-higher fees. For example:

- A California city initially proposed a $1,000 annual fee per site. The city later changed its own proposed agreement to hike fees to $10,800 – more than ten times higher. It explained that "the amount has been revised to reflect market rates for annual rents received in other cities in California."
- A city in New York quadrupled its per-site attachment fee it originally requested from Mobilitie from $500 to $2,000 – even though it had executed agreements with other providers at the $500 per attachment rate.
- A Nevada city initially proposed a fee of $1,200 but then changed its own proposal to double the fee to $2,400.
- A Georgia city initially granted permits with a one-time fee of $2000 per pole (in addition to separate application, ROW access fees and permits fees), but has now proposed an ordinance which would impose fees from $2,800 to $17,000, depending on the type of attachment and whether a new pole is involved.

Given this record, the Commission has an ample factual basis to curb ROW fees to prevent them from denying the public access to advanced and ubiquitous services.

III. GRANTING MOBILITIE'S PETITION IS CONSISTENT WITH THE LANGUAGE AND PURPOSE OF SECTION 253.

Commenters demonstrate that the Commission possesses ample statutory authority to issue a declaratory ruling to address ROW fees. The record shows that this ruling will be firmly

[14] *Id.* at 13.

grounded in the Commission's "statutory mandate to facilitate the deployment of network facilities needed to deliver more robust wireless services to consumer throughout the United States" and will fulfill its "responsibility to ensure that this deployment of network facilities does not become subject to delay caused by unnecessarily time-consuming and costly siting review processes that may be in conflict with the Communications Act."[15]

Commenters support each of the three rulings Mobilitie seeks. They show why the Commission should declare that "fair and reasonable compensation" means payment that compensates a locality for its costs, and why that ruling will provide consistency and certainty to providers and localities and speed siting because it will end disputes over what fees are lawful.[16] Similarly they explain why the Commission should rule that, whatever those "reasonable costs" are, a locality may not charge a wireless provider more than it charged other providers, because doing so would violate Section 253's admonition that fees must be "competitively neutral and non-discriminatory."[17] Finally, they support Mobilitie's request that the Commission declare that Section 253's phrase "publicly disclosed" means that localities must be transparent and disclose the fees they charged other providers.[18] As Sprint observes, "[O]ther entities must have access to records or contracts showing the compensation paid by other telecommunications providers, utilities and right of way users to ensure that the rates and terms offered are 'competitively neutral and nondiscriminatory.'"[19]

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[15] Public Notice at 2.

[16] AT&T Comments at 20-21; CTIA Comments at 28-32; T-Mobile Comments at 13.

[17] CTIA Comments at 32; Sprint Comments at 35; T-Mobile Comments at 14.

[18] Verizon Comments at 14; T-Mobile Comments at 14.

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[19] Sprint Comments at 35.

IV. ARGUMENTS AGAINST GRANTING MOBILITIE'S PETITION ARE MERITLESS.

Localities opposing the declaratory ruling rely on arguments that are factually incorrect, or are based on the legally erroneous claim that they have a unilateral right to set whatever fees they want, unrestricted by federal law.

Some localities state that their own ROW fees are reasonable, and some are cooperative and negotiate reasonable fees. However, the record reveals a vast disparity in the amounts and types of fees and in the frequency that fees are imposed. That disparity highlights those localities that impose ROW fees far in excess of what others charge, supports the finding that those fees are not "fair and reasonable" under Section 253(c), and underscores why Commission action is needed to interpret the Act to prohibit these high "outlier" fees. The fact that some jurisdictions comfortably charge little or nothing for small cell deployment in ROWs underscores why high fees are neither reasonable nor justified.

The argument that the Commission is being asked to engage in rate-setting is also incorrect.[20] Providers recognize that costs will not be the same across all communities.[21] But each community's charges must be linked to its own reasonable costs – put simply, it should not be able to profit from the public's demand for wireless services. Requiring communities to limit fees to their costs achieves Congress' purpose to curb excessive ROW fees while enabling localities to be fully compensated for their expenses.

[20] Virginia Department of Transportation Comments at 11.

[21] *See, e.g.*, Verizon Comments at 14.

The argument that localities are merely seeking "market"-based fees is also invalid.[22] It is not based on any provision in the Act, nor is it factually correct. There is of course no "market" for access to local streets, because localities have control over and regulate all construction. There is only one "supplier" to deal with multiple "buyers."[23] This is not a market – instead it is a monopoly in which regulatory constraints are essential to police against monopoly rents.[24]

Several localities assert they have "proprietary" rights over ROWs which entitle them to set fees without limit, but again, this argument ignores Section 253's language and purpose. To ensure that wireless and other services could be deployed to serve the public, Congress enacted Section 253 and other provisions of the Act, and Section 253 places express limits on "local legal requirements," which clearly encompass requirements that fees be paid as a condition to constructing facilities. Moreover, as commenters explain, localities do not have a proprietary right over ROWs and facilities in the ROWs, as distinct from rights they may have as an owner of private property. ROWs serve a public purpose, not a private one. Localities manage them through exercising their regulatory powers through laws and regulations, and it is precisely those "legal requirements" that Section 253 constrains to preclude localities from impeding telecommunications services.[25] Telephone and electric grids could not have been developed

[22] *See, e.g.*, Newport Beach Comments at 1; Oakland County Comments at 9; San Antonio, TX Comments at 27-28.

[23] Verizon Comments at 15 (explaining "[i]n many other cases, market forces are sufficient to ensure reasonable rates. But those competitive options do not exist for access to rights-of-way.").

[24] AT&T Comments at 18; ExteNet Comments at 41; Sprint Comments at 33; Tech Freedom Comments at 5; WIA Comments at 69; Conterra Broadband Services and Uniti Fiber Comments at 7; NTCA Comments at 3-4.

[25] CCA Comments at 26; CTIA Comments at 43-46; T-Mobile Comments at 30.

across this country without extensive use of ROWs. Those networks were rapidly deployed without imposing "market" fees in order to deploy services that would benefit the public, and thus benefit localities themselves. Wireless services are no different.[26]

Localities that assert they may unilaterally set fees do not separately defend *discriminatory* fee-setting, in which they charge higher fees to wireless providers than they had charged other ROW users. Section 253(c) does not require that different types of access must be priced the same, but the record reveals that some providers are forced to pay fees that were not imposed on utilities that installed their own wireless equipment in ROWs.[27] The Commission should confirm that Section 253 prohibits that and other forms of discrimination.

Nor do localities object to Mobilitie's request that the FCC interpret Section 253(c) to require localities to be transparent in their ROW fee requirements by disclosing the fees they have charged other ROW occupants. The Commission should grant this request as well. Disclosure of fees will bring the benefits of transparency to the currently opaque fee-setting process. It will enable providers to confirm that they are not being disadvantaged against others who have accessed ROWs.

Even though not related to the Petition's request for declaratory ruling on ROW fees, several parties criticize Mobilitie for requesting to install new poles to support wireless facilities in locations that they believe are inappropriate, or that would exceed the height of nearby

[26] ***See*** Gardner F. Gillespie, Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators,107 Dick L. Rev. 3029, 3215 ("Use of the streets for these purposes is not only consistent with the public purpose for which the streets were dedicated but benefits the municipality.").
[27] T-Mobile Comments at 7 ("Eighty percent of jurisdictions in T-Mobile's experience treat DAS and small cell deployments on poles in ROWs differently than they treat similar installations by landline, cable, or electric utilities."); ***see also*** Crown Castle Comments at 14.

municipal or utility poles.[28] Localities may review specific locations for effects on ROWs, traffic safety, or other considerations, and infrastructure providers seek to accommodate local concerns. Taller poles have advantages in providing more extensive coverage and can be spaced further apart, minimizing the number of new facilities. Nonetheless, given localities' concerns with taller poles, the company is committed to working with municipalities to develop appropriate locations consistent with surrounding structures and streetscapes.

Mobilitie's process and compliance efforts are designed to ensure that it identifies and fulfills every local requirement, and Mobilitie strives for compliance in meeting local regulations. At the kickoff meeting with the jurisdiction, Mobilitie introduces the deployment plan and supplies the proposed locations for antennas to provide optimal coverage. This meeting enables the company to receive feedback on local procedures and sensitivities. It then continues to work closely with the locality to address concerns regarding the design, location and height of any proposed facility in the community. In a few instances Mobilitie has missed a local notification or other requirement for pole installations.[29] Mobilitie took corrective action as soon it identified any issue. The company regrets any misunderstanding of prerequisites for installations and has taken steps to prevent any future issues.

While Mobilitie makes every effort to ensure that it follows local procedures, there is often room for differing interpretations as to how its deployment of new technology fits within the city's processes, which are generally designed for different, older technology. Some

[28] *E.g.*, National League of Cities Comments at 14 (Mobilitie proposed 123-foot pole when nearby poles were 45-60 feet high); Smart Cities Siting Coalition Comments at 20-21 (Mobilitie proposed a new pole in Laurel, MD historic district); Georgia Municipal Ass'n Comments at 3: Texas Municipal League Comments at 20.

[29] *E.g.*, Smart Cities Siting Coalition Comments at 18, 23; Cityscape Consultants at 3 (Mobilitie installed poles prior to obtaining approvals). Smart Cities also claims Mobilitie filed applications through several subsidiaries that did not hold state licenses to do business. While Mobilitie disputes this claim, it is clearly not pertinent to this proceeding, which asks the Commission to interpret federal law.

commenters label these situations with inflammatory terms, but these situations usually trace back to reasonable differing views on how new technology should be deployed using anachronistic regulatory structures. Mobilitie seeks to partner with cities to find the best way through these processes while pressing its fundamental view that small cell deployment in the ROW cannot be adequately addressed by the traditional regulatory regime. Issues can arise from ambiguity in the process, changing requirements from the city, and providers' efforts to deploy efficiently and speedily. It is inevitable that policies will be adjusted to meet the high demand for small cells and its particular technical needs. Mobilitie is committed to working with jurisdictions to adjust those policies. Jurisdictions should also recognize that their prior policies governing macrosites are ill-suited for the new small cell technologies and networks to meet the nation's rapidly expanding need for wireless infrastructure.

V. CONCLUSION

For the above reasons and those set forth in the comments, the Commission should take prompt and comprehensive action to lower the high fees and other barriers that are impeding wireless broadband from delivering its many benefits to the American public.

Respectfully submitted,

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